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IN THE

Supreme Court of the United States

October Term, 1976

No. 75-353
No. 75-354
No. 75-355

HOWARD PIPER, THOMAS F. PIPER and WILLIAM T. PIPER, JR.,
Petitioners,

v.

CHRIS-CRAFT INDUSTRIES, INC.,
Respondent.

THE FIRST BOSTON CORPORATION,
Petitioner,

v.

CHRIS-CRAFT INDUSTRIES, INC.,
Respondent.

BANGOR PUNTA CORPORATION, NICOLAS M. SALGO and DAVID W. WALLACE,
Petitioners,

v.

CHRIS-CRAFT INDUSTRIES, INC.,
Respondent.

On Writs of Certiorari to the United States Court of Appeals for the Second Circuit

BRIEF OF RESPONDENT CHRIS-CRAFT INDUSTRIES, INC.

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On Writs of Certiorari to the United States Court of Appeals for the Second Circuit

BRIEF OF RESPONDENT CHRIS-CRAFT INDUSTRIES, INC.

This brief is submitted by respondent Chris-Craft Industries, Inc. ("Chris-Craft") in answer to briefs by petitioners Bangor Punta Corporation ("Bangor") and two

of its officers; The First Boston Corporation ("First Boston"); and former insiders of the Piper Aircraft Corporation ("Piper").

Questions Presented

This litigation arises out of a contest between Bangor and Chris-Craft for control of Piper in 1969. At the end of the contest, Chris-Craft owned 42% of Piper's stock and Bangor held 51%. The Second Circuit, in a series of opinions, held that Bangor had acquired 14½% of its Piper stock, more than the margin of difference, by repeated violations of the securities laws. Those violations, not placed in issue by the certiorari petitions, deprived Chris-Craft of a fair opportunity to compete for control in a race in which it otherwise would have held a commanding lead. Moreover, the violations converted Chris-Craft's $60 million investment in Piper from an attractive plurality into a huge minority block that nobody would touch with a ten-foot pole.*

In view of petitioners' blatant violations in this extremely close race, the Second Circuit held in Chris-Craft's favor on three separate occasions over the past seven years, in opinions totaling nearly 200 pages. Virtually every member of the Second Circuit participated in some phase of the litigation. In *Chris-Craft I*, 426 F.2d 569 (C 1-31) (1970)

* App. 3023. Chris-Craft paid more than $44 million for its shares in 1969 (A 18) and has incurred almost $3 million a year in interest charges to carry the investment (EV 893). The Appendix in this Court is divided into sections A through F, and references herein preceded by an alphabetical letter are to that appendix, *e.g.*, (A 10). References to the printed appendix submitted to the Second Circuit in *CC II* and *III* are cited as "App.," *e.g.*, (App. 10), or, if the reference is to that appendix's Exhibit Volumes, as "EV," *e.g.*, (EV 25).

("*CC I*"), and *Chris-Craft II*, 480 F.2d 341 (A 1-124) (1973) ("*CC II*"), the court found the violations and the injury. In *Chris-Craft III*, 516 F.2d 192 (B 1-42) (1975) ("*CC III*"), it calculated the damages. The Second Circuit acted *en banc* in the first decision and denied *en banc* reconsideration of the other two. In 1973, this Court denied certiorari on all the liability issues. 414 U.S. 910.

The *Chris-Craft* opinions have been widely followed across the nation because they reflect sound and traditional legal principles. And the Solicitor General, after a four-month review of this protracted litigation at the invitation of this Court, concluded that this case had been correctly decided and that the quantum of damages was proper.*

Petitioners now rehash their claims as to liability—claims labeled "frivolous" by the Second Circuit (B 40, n.30). Petitioners also raise issues as to the damages, even though the Second Circuit fixed damages at the "minimum amount" permissible (B 25) and noted that about the same damages would result using the theory of petitioners' star witness (B 31-32, n.24).

In light of the foregoing, the following questions are raised:

As to liability:

(1) Does a defeated contestant for control who obeyed the securities laws and lost an extremely close race have standing to sue its rivals, who won by repeatedly defying laws which Congress enacted to assure fair contests and

* Brief for the United States as *Amicus Curiae* Opposing Certiorari (Feb. 1976).

which were intended to provide a private right of action for all parties?

(2) Did petitioners lack scienter when they committed constant violations of the securities laws in a protracted campaign against Chris-Craft, when they knew material facts which they concealed, and when Bangor purchased critical blocks for $9 million cash in defiance of warnings by the Securities and Exchange Commission ("SEC") and its own counsel?

(3) Has causation been established where petitioners' misstatements were material, where Bangor's illicit acquisitions of 14½% of Piper's stock spelled the difference between victory and defeat, and where Chris-Craft would have had a formidable lead in the absence of those unlawful acquisitions?

As to damages:

(1) Did the Second Circuit compute damages correctly by taking the difference between Chris-Craft's cost before petitioners' violations and the highest resale price after Bangor illegally seized control, particularly where the appellate court deliberately awarded the minimum possible damages?

(2) Was it appropriate to hold petitioners jointly and severally liable where their combined violations contributed to an indivisible injury to Chris-Craft?

(3) Should First Boston enjoy immunity as an investment banker under Section 11 of the 1933 Act, even though

First Boston was found liable under Section 14(e) of the Securities and Exchange Act of 1934, 15 U.S.C. §78n(e), which requires proof of a more egregious violation than under Section 11?

Statement of the Case

Petitioners seek a de novo trial. They rely on claims rejected below, seek to create the appearance of factual conflicts between the trial and appellate courts and distort the opinions below. Such tactics cannot prevail. This was not a case of contested facts. Most of the critical facts were stipulated. The disputes related only to legal theories.*

The undisputed facts are as follows:

The "Scorched Earth" Policy

In December 1968, Chris-Craft began purchasing Piper stock. On January 23, 1969,** after accumulating more than

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* Thus, in *CC II*, dealing with liability, virtually all of the facts were stipulated over a period of almost a year, a point noted by the district court (A 161, n.22) and Second Circuit (A 7, n.1). The Second Circuit reversed in *CC II* because the district court applied incorrect legal standards (A 37).

Similarly, in *CC III*, dealing with damages, each side presented experts who submitted written reports in advance of trial. The basic differences were in the legal theories used by each expert, as opposed to disputes as to facts. The district court (B 45-47) and Second Circuit (B 12-17, 24-25) also stressed this point. And the Second Circuit reversed because "the district court applied an improper legal standard to the facts in formulating the measure of damages" (B 17, n.12).

** All subsequent dates, unless otherwise indicated, are in 1969.

200,000 shares, Chris-Craft annouced a $65 cash tender offer for 300,000 or more shares. The tender offer was approximately $12 above Piper's price on the New York Stock Exchange ("NYSE"). Without even studying the offer, the Piper insiders immediately opposed Chris-Craft and enlisted the aid of First Boston (A 10; App. 227), which advised them throughout the ensuing contest. The insiders' opposition, unprecedented in its fury, was characterized by an avowed "scorched earth" policy (App. 1890).

Between January 25 and 28, the insiders sent public stockholders three urgent letters opposing the tender offer (App. 240, 241-42, 246). Stressing their fiduciary duty to Piper's shareholders, the insiders stated that the $65 offer was "inadequate." In making that claim, the insiders concealed the facts that First Boston had privately advised them that $65 was indeed "fair and equitable" and that they were trying to sell 300,000 shares to Grumman Aircraft Corp. ("Grumman") at the identical price (A 37-38). In finding these letters to be materially misleading in violation of Section 14(e), the Second Circuit declared:

> "The Piper family's culpability regarding these shareholder letters is clear. Corporate officers and directors in their relations with shareholders owe a high fiduciary duty of honesty and fair dealing. . . . The Piper family obviously disregarded this obligation when they sent out these shareholder letters knowing that they were materially misleading." (A 38)

These misleading statements were promptly followed by an outright falsehood. On January 29, the insiders issued a press release, mailed to the shareholders, claiming

that Grumman "has agreed to purchase" 300,000 Piper shares at $65 a share (A 12, 39)—an investment commitment of $20 million. The press release stimulated headlines in the *Wall Street Journal* and *New York Times*—"Grumman Plans to Buy from Piper Aircraft 300,000 Unissued Shares; Merger Possible," "Grumman Will Buy Piper Block" (App. 271).

The Grumman press release was a hoax. While acquiring 300,000 shares, Grumman had an absolute right to "put" those shares back to Piper at the purchase price plus interest, and Piper had to segregate the Grumman funds to protect the put (A 11-12). In short, Grumman was not committed to invest $20 million in Piper: instead, it was given a free option (A 39). That fact was deliberately concealed, and the Grumman deal was rescinded shortly after the close of Chris-Craft's tender offer.

Asked why Piper issued 300,000 shares before Grumman would make a firm commitment, Piper's president, petitioner W. T. Piper, Jr., admitted that it made the Chris-Craft tender offer "less attractive to our shareholders" (A 135, n.6). The district court and the Second Circuit stated that Chris-Craft's tender offer was "adversely affected" by this publicity about an alleged Grumman agreement that was never consummated (C 34; A 39-40, 61-62). Although Chris-Craft had offered a cash price 20% above market, it could attract only about 300,000 of the 900,000 shares owned by the public. In condemning the false Grumman press release, the Second Circuit stated:

> "But Piper's failure to describe the put in its press release, or in its subsequent letter to shareholders, constituted a material omission in violation of §14(e).

> . . . The Piper family recklessly disregarded its obligation to shareholders in failing to disclose with substantial accuracy a transaction which was likely to affect the attitude of Piper shareholders toward the CCI tender offer." (A 39-40)

Although First Boston participated in the Grumman negotiations (App. 258), it chose "to remain silent" about the press release on the ground that it had "a kind of professional privilege" not to speak out.*

After carefully reviewing all of the insiders' misleading statements in January, the Second Circuit concluded:

> "[T]hese misleading statements most likely had a continuing adverse effect on CCI's attempt to acquire Piper shares. When Piper shareholders were deciding whether or not to accept CCI's [subsequent] exchange offer, many undoubtedly remembered and were influenced by the Piper family's misleading January statements portraying CCI as a company that made inadequate and unfair offers." (A 62-63)

As the next step in the "scorched earth" policy, the insiders, in consultation with First Boston, agreed to issue almost 470,000 shares of stock—about 30% of Piper's authorized stock—to acquire two unsuccessful companies in fields unrelated to the airplane industry, U. S. Concrete Company of Florida, and SouthPly, Inc. (A 13; App. 52). The insiders did not seek stockholders' approval, as required by Piper's listing agreement with the NYSE (A 13; C 35). Accordingly, Piper's registrar, Bankers Trust Company, refused to register the new shares (App. 2093). But this did not faze the insiders. Piper took what the Second

* First Boston Trial Memorandum at 5-7 (March 4, 1971).

Circuit described as the "extremely unconventional" step of acting as its own transfer agent and registrar: it printed new certificates and delivered them to the sellers of the two businesses (A 13). As a result, the NYSE initiated delisting proceedings against Piper and suspended all trading. *Id.* The insiders finally rescinded the transactions (C 35).

Petitioners' "Gun-Jumping" Press Release

In late February, Chris-Craft began processing a registration statement for an exchange offer in order to obtain a majority of Piper's shares. Shortly thereafter, the Piper insiders turned to Bangor, recruited by First Boston, in a final attempt to defeat Chris-Craft (A 14-15). This time they succeeded, as the result of new violations of the securities laws by their partner and advisor.

On April 20, First Boston, Bangor, and the Piper insiders held a summit conference at the Yale Club that led to an agreement dated May 8 (App. 317, 318). Under the contract, the insiders exchanged their 500,000 shares (about 31% of Piper's outstanding shares) for a package of assorted Bangor paper. Bangor agreed to use its best efforts to acquire additional Piper shares to attain more than 50%. It promised to make an exchange offer to Piper's public shareholders for a package of unspecified securities (A 14-15; C 36). On May 8, Piper and Bangor announced in a press release that Bangor would offer a package of securities to Piper's public shareholders "to be valued in the judgment of the First Boston Corporation at not less than $80 per Piper share" (C 5).

The SEC promptly brought an action against Piper and Bangor in the United States District Court for the District of Columbia charging that the $80 press release violated the SEC's "gun-jumping" rule, Rule 135, because it placed a dollar value on an unspecified bundle of Bangor securities as to which no registration statement had been filed (C 6). Bangor and Piper immediately consented to an injunction against further violations of the securities laws during the control contest (C 6). In *CC I*, the Second Circuit *en banc* held that the May 8 press release violated the "gun-jumping" rule (C 11-15). Despite the SEC's injunction, Piper repeated the $80 estimate to the *Wall Street Journal* on July 17—just before Bangor's exchange offer became effective (App. 1611-13; EV 131-33). During this period, Chris-Craft's competing exchange offer to Piper stockholders (consisting of securities and cash)—which in conformity with SEC rules made no prediction of value—had to compete against the promised $80 Bangor package.

The Insiders' $13 Million Bonus

To guarantee the success of its exchange offer, Bangor gave the Piper insiders a personal incentive to use their influence with public shareholders. Bangor promised the insiders a bonus if they helped Bangor obtain more than 50% of Piper's stock (A 14-15). Bangor's chairman conceded that the purpose of the bonus was to assure the "absolute cooperation" of the insiders (App. 2156). The insiders stood to reap a windfall of $13 million by July 18, the effective date of Bangor's exchange offer, if they could induce enough shareholders to accept Bangor's, rather than Chris-Craft's, exchange offer (A 40-41). Accordingly, the

insiders issued letters, telegrams and press releases in June and July urging the public to side with Bangor (A 40-41). These communications did not mention the $13 million bonus (A 40-41). Finding that this was a material omission contrary to Section 14(e), the Second Circuit stated:

> "Under these circumstances, the Piper shareholders were entitled to receive information sufficient to make an informed judgment on the weight to be given the personal recommendations of the Piper family." (A 41)

Bangor's Illegal $9 Million Cash Purchases of the Key Blocks from Cornfeld and Others

Both sides recognized that the close contest might well hinge on approximately 120,000 Piper shares (approximately 7½% of the outstanding shares) held by three funds, the largest controlled by Bernard Cornfeld. But SEC Rule 10b-6 prohibited either side from making cash purchases of those swing blocks during its outstanding exchange offer (C 15-18).

The SEC staff, recognizing the significance of these blocks, summoned Chris-Craft to a meeting on April 7. It warned Chris-Craft that Rule 10b-6 prohibited a tender offeror from purchasing Piper stock during its exchange offer (App. 1212-14). The SEC advised Chris-Craft that the same ground rules would apply to the other participants (App. 1213-14). Chris-Craft complied with the SEC's warning and thereafter refrained from buying any Piper stock for cash during its exchange offer (A 13).

Bangor showed no such restraint. At the April 20 summit meeting at the Yale Club, the Pipers, First Boston and

Bangor discussed cash acquisitions of the large key blocks. A First Boston official made the following notes, referring principally to the Cornfeld block:

> "Oppenheimer
> Lipper } 156,000 (two blocks)
>
> • • •
>
> —if you could take block from under him [Chris-Craft], good chance to win." (App. 382-1)

And Piper's proxy solicitor "kept wringing his hands about some 150,000 shares" held by funds committed to Chris-Craft (App. 1826). Bangor's president, Wallace, also recognized that if these shares were tendered to Chris-Craft, it would virtually be assured of control (App. 1826-27). Accordingly, the initial drafts of the agreement between Bangor and the Piper insiders, negotiated by First Boston (App. 318, 323-24), obligated Bangor to use "its best efforts" to purchase those pivotal blocks for cash (App. 383-84; EV 177, 194-95, 217-18).

The importance of the blocks was underscored in Bangor's April 23 strategy memo, which assumed that Bangor would acquire majority control by purchasing those blocks for cash in addition to the stock to be acquired from small shareholders in exchange for Bangor's paper (EV 298; App. 1824-26). Bangor's president, Wallace, was willing to spend cash for Piper stock, but only if he was assured of gaining control (EV 300). On May 6, Wallace told Bangor's Executive Committee, "[T]he existing information indicates that about 104,000 shares of Piper Aircraft are being held by several funds on behalf of Chris-Craft Industries, Inc. He [Wallace] . . . did not know whether this stock could be acquired," because, Wallace testified, he understood that the shares were "emotionally committed to Chris-Craft" (EV 139; App. 1836).

On May 5, while petitioners were making plans to buy the crucial shares for cash, the SEC issued a public notice specifically pointing out that such cash acquisitions were forbidden. The SEC release, proposing Rule 10b-13 outlawing cash purchases of target stock during an exchange offer, stated that existing Rule 10b-6 also prohibited such purchases:

> "This provision [proposed Rule 10b-13] is, in effect, a codification of existing interpretations under Rule 10b-6, which among other things, prohibits a person making a distribution from bidding for or purchasing the security being distributed or any right to acquire that security. These interpretations have pointed out that the security to be acquired in the exchange offer is, in substance, either a right to acquire the security being distributed or is brought within the rule under paragraph (b) thereof; and Rule 10b-6 prohibits the purchase of such security during the distribution except through the exchange offer unless an exemption is available . . . ." SEC Release No. 34-8595 (C 15-16).

It is stipulated that Bangor and the Piper insiders learned of the SEC release shortly after its issuance (App. 381).

John Flick, Bangor's General Counsel and Senior Vice President, testified that while he, Bangor's securities specialist and Bangor's outside counsel disagreed with the SEC's interpretation of Rule 10b-6, they instructed management to take a conservative position:

> "[W]e all came to the same conclusion, that that had never been a proper use of 10b-6. However, we felt that under the circumstances we should take a con-

servative position and therefore what we instructed management, in effect, was, or in substance, that in view of that language that we should not involve ourselves in the solicitation of any shares, in other words, that we thought it proper to buy shares of stock but only if they were unsolicited and not over an exchange.

Q. Did you give that advice to any of the executives at Bangor Punta?

A. Yes. I am sure that Mr. Martin and I both told Mr. Wallace and Mr. Salgo, the chairman of the board." (App. 1645)

Mr. Flick also cautioned management about the prohibition in Rule 10b-6 against purchasing shares from a broker or dealer (App. 1696-97).

Despite the SEC's May 5 warning and Flick's advice, Bangor went ahead with the game plan and solicited the critical control blocks for $9 million cash—the only cash it spent until after its exchange offer, when control was assured. Thus, on May 14, Bangor solicited Cornfeld's 78,600 shares for $80 per share in the Bahamas; the next day, it purchased 20,000 shares from American Securities Corporation, a broker-dealer; and between May 16 and 23, Bangor purchased 21,600 Piper shares from Bay Securities Corporation, another broker-dealer (A 16; App. 387, 389, 393, 396). It did not disclose the purchases from American and Bay to its counsel until after the fact (App. 1645-46, 1697).

In summary, between May 14 and 23, shortly after the SEC's May 5 public warning, Bangor appropriated three blocks totaling 120,000 Piper shares—or approximately 7½% of Piper's outstanding stock—for more than $9 million in cash. Bangor acknowledged shortly thereafter that these cash purchases sealed Chris-Craft's fate:

"Because of the large holdings of Bangor Punta and the Piper family, Chris-Craft will not be able to control the management of Piper or combine Piper's business with that of Chris-Craft."*

The Second Circuit, *en banc*, condemned those cash acquisitions in *CC I*. It declared that they offended the "letter" and "spirit" of Rule 10b-6, unless Bangor could prove that they were not solicited and were not purchased from broker-dealers (C 15-18). The court remanded for a determination of that issue (C 18). At the trial in *CC II*, Bangor stipulated that its purchases from Bay and American were from broker-dealers and thus were not exempt under Rule 10b-6 (A 149). But it claimed that Cornfeld was not a broker-dealer and that its purchase of almost 80,000 shares from him was not solicited. The district court found against Bangor, stating about Bangor's trip to Cornfeld's establishment in the Bahamas:

"Absent any other cogent explanation for the visit the facts seem to point fairly at a solicitation of the purchase from Proprietary [Cornfeld's fund] as the reason for the visit." (A 149)

The Second Circuit in *CC II*, as in its *en banc* decision in *CC I*, castigated Bangor for making the $9 million cash purchases of the critical blocks in defiance of Rule 10b-6 (A 16). It added:

"Even arithmetically, it is apparent that the block purchases in violation of Rule 10b-6 were essential to

* Complaint in *Bangor Punta Corp.* v. *Chris-Craft Indus., Inc.*, 69 Civ. 2354 (S.D.N.Y.), June 2, 1969, ¶11D.

achieve control. BPC's attainment of a majority position has caused CCI to suffer a decline in the value of its Piper holdings." (A 67; *see also* A 96, 111)

Bangor's False Exchange Offer

In addition to the key 7½% cash blocks, Bangor acquired an additional 7% of Piper's stock (111,000 shares) by means of its exchange offer, which the district court and Second Circuit found was materially misleading. That 7% block also provided the margin of difference in the tight race. The SEC filed a new action against Bangor because of the fraudulent registration statement, which was tried with Chris-Craft's suit.

Bangor's exchange registration statement and prospectus, endorsed by First Boston, represented that The Bangor and Aroostock Railroad ("BAR"), a railroad subsidiary, had a "market price evaluation" of $18.4 million (EV 99). The district court stressed that this figure was represented to be fair market value, not historical or book cost (A 142; D 4-5). The $18.4 million figure was false. Bangor concealed that it had been trying to sell BAR for some time; that the only interested buyer offered $5 million; and that Bangor was then contemplating a sale at about that price—a sale it authorized on the second business day after it took control of Piper (A 44-46).

Bangor's board minutes describing the BAR affair, reprinted in the Second Circuit's opinion because they are so important (A 51-54), show that on April 1, Bangor's board appointed a blue-ribbon committee of railroad experts headed by Curtis M. Hutchins, a director of Bangor, a

member of its Executive Committee and past president of BAR, to study disposition of the unprofitable railroad (D 5).* After reviewing the options, the Hutchins committee reported its conclusions to the board on May 21. It recommended a sale of BAR to the Amoskeag Company, a railroad headed by F.C. Dumaine (A 53). Hutchins stated that Dumaine was "the only person whom he knew who might be interested" and that Dumaine "had indicated he might be willing to pay $5,000,000" (A 53). Bangor's Chairman asked if Dumaine would pay $7,000,000 (A 53-54). Hutchins replied that Dumaine would probably stand fast at $5 million (A 54). The board then authorized Hutchins to negotiate a deal, subject to board approval and a study of accounting and tax ramifications (A 54).

Hutchins then resumed negotiations with Dumaine and actually gave him an unsigned letter for a sale at $5 million dated May 27, 1969 (EV 1-2). On June 16, while Bangor's exchange offer was in registration, Dumaine wrote the following inter-office memo of his conversation with Hutchins that day:

> "Curtis Hutchins said we definitely have a deal—they are in registration—he hopes to be out of registration in ten days—of course, that is questionable. He was informed by his lawyers that a definite commitment should not be made within two months of registration. We agreed that in the meantime I should go over the railroad with whomever I want to see the overall condition of the property and to meet the staff so that I will be prepared to select a staff on consummation date, if and when we have a consummation date." (EV 3)

* The Committee also included Gordon Robertson, co-Chairman of Bangor's board, Chairman of its Executive Committee and past president of BAR, as well as two other directors of BAR. The district court described the committee as "a highly knowledgeable group on matters pertaining to the railroad and its problems" (D 5).

The district court concluded that Bangor's board had not made a firm decision to sell BAR for $5 million during the control contest (A 143), saying that "Dumaine and Hutchins who negotiated and desired the sale, believed what they wished to believe, that their personal agreement concluded all but the formalities" (D 11, n.9). The sale following Bangor's acquisition of control showed that they were right.

In any event, the district court found that the representation that BAR had a "fair market value" of $18.4 million was materially misleading (D 15):

> "[T]he circumstances do indicate a sufficiently serious consideration of the possibility of sale at a figure some $13 million below the then carrying value of the BAR stock on Bangor Punta's books so as to force the conclusion that *the Bangor Punta directors could not, at the time, have believed* that the $18.4 million figure (based on an appraisal of 1965 fair market value) any longer represented a responsible appraisal of market value of the BAR holding." (D 13) (emphasis added)
>
> • • •
>
> "[T]he $18.4 million carrying figure of the BAR holding was obsolete to the point of being misleading." (D 14)

The district court stated that it was

> "aware of no principle of accounting or of fair disclosure which would justify a failure to up-date a constructed carrying figure which may have reflected approximate fair value in 1965 but which was almost four times the offer of a willing buyer (and the only willing buyer) in 1969—an offer which the Board, despite its efforts in good faith to find alternatives—was constrained ultimately to accept. Consistency of fair disclosure required exposure of circumstances which so clearly rendered obsolete an appraisal made four years earlier." (D 14)

The district court explained why nondisclosure of the $13 million loss was so material. Disclosure "would involve the loss ($4.32 per share) which would have far exceeded the company's net income for any of the five prior years" and would have wiped out 36.5% of Bangor's retained earnings and "12% of the shareholders' book equity" (D 15).

By any standards, this was a highly significant matter in the context of competing exchange offers in a close control race. The Second Circuit condemned the BAR misrepresentations, stating:

> "We believe that the officers of BPC greatly transgressed their allowable area of discretion in not disclosing the BAR negotiations and other circumstances reflecting the value of the BAR. The officials in charge of the exchange offer were well aware of the discussions with Amoskeag and the activities of the special BAR committee. They also were aware of all the other circumstances that indicated that the book value of the BAR was deceptive and unrealistic . . . . They showed reckless disregard for the import of their activities concerning the BAR. They knew that the book value of the BAR set forth in the registration statement was no longer realistic." (A 47-48)

Bangor now concedes that it has "of course, never contended that in 1969 its directors believed the market value of the BAR to be $18.4 million." Br. for Bangor at 58.

No one can seriously defend the BAR fraud in this Court. Its impact was dramatic, particularly because the public viewed the competing exchange offers as roughly equivalent. Chris-Craft received 112,000 shares under its exchange offer; Bangor received 111,600 (A 18). The $13 million BAR over-statement, with its devastating impact on earnings and net worth, could not have been more material to a Piper shareholder faced with choosing between the two exchange offers. The Second Circuit declared: "Since BPC eventually acquired only about 51% of the outstanding Piper shares, it is clear that the 7% acquired through its exchange offer was critical to its success" (A 60).

First Boston's Complicity

First Boston—acting as advisor to the Piper insiders, appraiser for the Piper shareholders, and strategist for Bangor—played a key role at every critical stage of the nine-month campaign. It was held liable as an aider and abettor under Section 14(e) in connection with the four-fold inflated BAR value. First Boston called no witnesses at trial and the facts of its conduct were substantially stipulated.

First Boston had read Bangor's minutes disclosing that, after a long search, Bangor was prepared to sell BAR for $5 to $7 million (A 51-54). First Boston thus *knew* that BAR was not worth $18.4 million as represented. Despite this knowledge, First Boston endorsed BAR's inflated value in Bangor's registration statement and prospectus on its exchange offer. First Boston also endorsed this figure as the impartial expert to assure the public that

Bangor's exchange package had an $80 value.* The Second Circuit regarded First Boston's behavior as highly culpable. It declared:

> "... First Boston's certification of the BPC registration statement carrying the BAR at $18.4 million amounted to an almost complete abdication of its responsibility to potential investors, to CCI, and to others who relied upon it to detect misrepresentations. We hold that First Boston possessed enough information reasonably to deduce that the BPC registration statement was materially inaccurate." (A 55)

A Summary of the Violations

Petitioners' resistance to Chris-Craft was marked by deliberate defiance of the securities laws from start to finish. The following is a recapitulation of petitioners' violations:

1. The insiders' January letters describing the Chris-Craft $65 cash tender offer as "inadequate," without disclosing First Boston's advice that it was fair.

2. The insiders' January press release claiming that Grumman had committed to invest $20 million in Piper, whereas in fact Grumman merely held a free option which it allowed to lapse—a deal which First Boston helped negotiate.

3. The May 8 press release announcing an $80 exchange offer contrary to the SEC's "gun-jumping" rule.

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* That independent and expert judgment was to be made in light of First Boston's own views as to the value of Bangor's assets (including BAR) and other factors (A 42).

4. Bangor's $9 million cash purchases of the key 7½% blocks in deliberate violation of Rule 10b-6 and the warnings of the SEC and its own counsel.

5. The insiders' June-July letters urging rejection of Chris-Craft's exchange offer, without disclosing the insiders' $13 million bonus.

6. Bangor's exchange offer, endorsed by First Boston, concealing the $13 million BAR loss.

At every juncture of the battle, petitioners committed flagrant violations—so flagrant that the SEC brought two actions and the NYSE initiated disciplinary proceedings. There has never been a control contest so close, where one side's misbehavior was so persistent, and where the victim's injury was so great. Chris-Craft has been left a cripple, with its $60 million investment destroyed and most of its resources in an illiquid position in Piper.

The Critical Effect of Petitioners' Violations

Petitioners' violations gave Bangor a 45%-41% advantage over Chris-Craft at the close of the competing exchange offers in August. That was a virtually unbeatable lead, according to both sides' experts at the trial in *CC III*.*

Bangor's 45%-41% lead was insurmountable because, with only a relatively few Piper shares outstanding, Bangor

* App. 2430-31, 2629-30, 2722, 2876, 3020; EV 831. Indeed, at that point Chris-Craft asked Bangor to extend its exchange offer several days so that it could exchange its Piper stock for Bangor securities without violating Section 16(b) of the Securities Exchange Act, 15 U.S.C. §78p(b) (App. 2180-81). Bangor refused.

could reach 50% by purchasing only one share for every two that Chris-Craft needed (App. 1241-42).* Thus, Bangor could pay double the price per share that Chris-Craft could. The "scorched earth policy" had worked. The contest was over. Bangor proceeded to buy the few additional shares necessary to reach 50%.

In the absence of Bangor's unlawful acquisitions of 14½% of Piper stock, the picture would have been reversed. Chris-Craft would have led by at least 41% to 31% at the end of the exchange offers in August.** Such a lead would have been virtually unbeatable according to experts for both sides in *CC III* (App. 2430-31, 2629-30, 2722, 2876, 3020; EV 831). Petitioners' expert called such a lead "formidable" (App. 2876). Respondent's expert reported that it would have given Chris-Craft a statistical 99-to-1 assurance of victory (EV 831). And the Second Circuit recognized in *CC III* that Chris-Craft's position in a fair race would normally have commanded a control premium (B 21, 25-27). But petitioners' violations deprived Chris-Craft of an opportunity for control and transformed its $60 million investment into an albatross. As the majority holder, Bangor had the power to merge Chris-Craft out of Piper at any time, presumably at the bottom of the market

* Chris-Craft stopped buying shares then because the outcome was irreversible (App. 3087).

** Chris-Craft undoubtedly would have enjoyed an even larger lead. That is so because on the competing exchange offers in July (on which Chris-Craft attracted slightly more shares than Bangor Punta), Chris-Craft would have obtained some, if not most, of the Piper shares tendered to Bangor if the bad news about BAR had been disclosed. Moreover, the insiders' false statements in January dissuaded public stockholders from tendering more shares to Chris-Craft (A 62-63).

when prices were depressed (A 69; App. 2521-22, 2584-85, 2590; *see* EV 31; App. 329-30).*

The experts in *CC III* agreed that no private purchaser would buy Chris-Craft's 42% minority block.** Chris-Craft's only conceivable escape, according to the experts and the Second Circuit (B 28-29), was a registered public offering of its 700,000 share block (B 28; EV 834-35, 1236, 1246). Indeed, some experts questioned whether a public sale was possible (App. 2578-82, 2633-34; EV 883-85, 923, 926). Petitioners' own experts would not allow their Wall Street firms to sponsor such an offering without a firm commitment from Bangor and Piper to cooperate (App. 2831-32, 2859-60, 2862-65). The Second Circuit noted, based on the undisputed trial record (B 29-30), that a public offering, if it were possible at all, could not have taken place before January 1970 at the earliest (on assumptions most favor-

* Bangor had every intention of going forward with such a merger. From May 8 on, Bangor repeatedly declared its intent to combine with Piper (App. 326, 329; EV 31, 1471). Indeed, Bangor's agreement with its principal lender obligated it to acquire 90% of Piper within one year (EV 1474-77). Only the injunction entered by the courts below have prevented Bangor from carrying out this announced merger before November 1979 (C 8; B 81).

** B 28; App. 3023, 2435-36, 2525, 2633-34; EV 1244-46. A private purchaser of Chris-Craft's 42% minority interest would be at Bangor's mercy with respect to management and policy decisions. Moreover, he would be under the constant cloud of a merger threat by Bangor at a date selected for its own advantage. At that time, he would be forced to accept a grab-bag of Bangor securities or engage in a protracted and uncertain statutory appraisal proceeding, unappealing alternatives according to the experts (App. 2601, 2522-24, 2587-88; EV 884-85, 923). On the disadvantages and pitfalls of appraisal, see generally, Vorenberg, *Exclusiveness of the Dissenting Stockholder's Appraisal Right*, 77 Harv. L. Rev. 1189, 1201-02 (1964); Manning, *Shareholder's Appraisal Remedy*, 72 Yale L.J. 223, 233 (1962).

able to petitioners); and such an offering would have netted Chris-Craft only about $27 per share (B 29).*

In contrast to the $27 maximum resale value, Chris-Craft's shares had an average cost of $64 and would have commanded a substantial control premium in a fair race where it would have been leading (B 25-27). Indeed, Bangor paid $80 for the key blocks, and its president testified that it was a sound investment (B 26, 22, n.15). Nevertheless, the Second Circuit computed "minimum" compensatory damages as the difference between Chris-Craft's cost ($64) and its optimum resale price ($27). The Second Circuit stated that, because it was computing damages itself rather than remanding, it would ignore Chris-Craft's control premium, assume that a public sale was possible, and give "defendants the benefit of the doubt" (B 26). It described its award as "the minimum amount of damages that the district court could have awarded without committing reversible error" (B 25). And the court, verifying its award, noted that virtually the same damages would

* Petitioners offered no evidence to dispute the $27 figure or the January date given by respondent's expert, Sigmund Warshager of Bear, Stearns & Co., in his pre-trial written report and in his testimony on the first day of the damage trial. Instead, petitioners' principal expert, Gant, simply assumed that Chris-Craft could have made an "overnight" public offering on the day Bangor achieved control (September 5, 1969); and he estimated that Chris-Craft would have received between $41.60 and $43.50 per share on such an offering (B 30; EV 1236). Gant also testified that in the unlikely event Chris-Craft could have found a private buyer for its stock on September 5, a 25%-30% discount would have been required (B 31, n.24). The Second Circuit found that a private placement was unrealistic and that legal and other requirements would have made a public offering impossible until January 1970 at the earliest (B 28-30). In fact, a registered offering would not have been possible until May because Piper's financials were delayed and were not approved by Bangor until after April 24, 1970 (App. 2441, 3002; EV 1007). By May, the market had collapsed (App. 2455-56).

have resulted if it had used petitioners' expert evaluation theory which assumed a hypothetical private placement in September on the very day Bangor seized control (B 31-32, n.24).

Summary of Argument

Only the facts—nothing else—are unusual about this case. Bangor illegally acquired two 7% blocks of Piper. Without either block, Bangor would not have 50%. Without both blocks, Chris-Craft would have enjoyed a formidable 41% to 31% lead after the exchange offers. First Boston promoted Bangor's misleading exchange offer despite its actual knowledge that BAR's value was inflated fourfold. And the Piper insiders injured Chris-Craft by fraudulent letters and press releases. The violations are undisputed. The injury is clear. The damages are conservative.

Petitioners, however, argue that this Court's recent opinions in securities cases give them an escape route. But those decisions do not condone what happened here.

*Rondeau** stressed that the Williams Act does not "tip the balance" in control contests and emphasized that private actions are a vital supplement to the SEC's limited enforcement capabilities.

*Blue Chip,*** approving the Second Circuit's *Birnbaum*† rule, denied standing to a passive spectator, who risked no money, in order to discourage "vexatious" suits—hardly

* *Rondeau* v. *Mosinee Paper Corp.*, 422 U.S. 49, 58-59, 62 (1975).

** *Blue Chip Stamps* v. *Manor Drug Stores*, 421 U.S. 723 (1975).

† *Birnbaum* v. *Newport Steel Corp.*, 193 F.2d 467 (2d Cir.), *cert. denied*, 343 U.S. 956 (1972).

a germane precedent because Chris-Craft invested $60 million in buying 700,000 shares.

*Hochfelder** rejected negligence as a substitute for scienter under the antifraud provisions of Section 10(b), as the Second Circuit did here under Section 14(e). Petitioners were held liable because they violated the law with actual knowledge of incriminating information and with reckless disregard for the consequences of their conduct.

Finally, *TSC*** approved an objective standard of materiality, held that a plaintiff need not prove that a misrepresentation changed the result, and again stressed the importance of private enforcement of the securities laws. *CC II*, cited in *TSC*, applied the same principles.

In short, the Court's recent quartet of opinions make *Chris-Craft* an *a fortiori* case. They all approve legal standards, long accepted by the Second Circuit, that were applied here on an undisputed factual record. Moreover, in contrast to the dubious claims in those recent cases, here there is an overpowering case of repeated violations and massive injury to a $60 million investment in a contest unique because of its closeness.

Petitioners' efforts to discredit the Second Circuit's decisions are without merit:

(1) *Violations*: Each petitioner suggests that its violations were at most mere technicalities. But petitioners did not even present the issue of their violations in their certiorari petitions. Their untimely effort to rationalize their conduct in their briefs cannot eradicate the fact that Bangor flouted Rule 10b-6 in spite of warnings by the SEC and

* *Ernst & Ernst* v. *Hochfelder*, 96 S. Ct. 1375 (1976).

** *TSC Industries, Inc.* v. *Northway, Inc.*, 96 S. Ct. 2126 (1976).

its own counsel, and that the Piper and BAR misrepresentations were adjudged material under a stricter standard than required by *TSC*. The Second Circuit found that petitioners' violations struck at the heart of the regulatory scheme, offending both the letter and spirit of Rule 10b-6 and Section 14(e).

(2) *Standing*: Petitioners basically stake their appeal on the claim that control contestants such as Chris-Craft lack standing to sue. They contend that, no matter what their rivals do, parties were left by Congress to fend for themselves. But the legislative history, which petitioners' briefs mutilate, shows that Congress and the SEC, the proponent of Section 14(e), opposed allowing tender contests to degenerate into "industrial warfare," sought to strike a balance between entrenched management and the offeror, and intended private actions by all parties as a means of policing conduct in such contests.

The principle of implied private actions by all parties to a contest was pioneered under the proxy regulations, which Congress sought to emulate in the Williams Act. The courts, commentators, and the SEC (whose interpretation as the principal draftsman of Section 14(e) is entitled to special weight) have all recognized that a private right of action by the contestants is in accord with congressional intent. Public policy also compels this result.

(3) *Scienter*: Petitioners claim that they cannot be held liable because they lacked an evil state of mind. But they acted with actual *knowledge* of the material facts they hid; and Bangor purchased stock for cash in deliberate disregard of Rule 10b-6, and the warnings of the SEC and its own counsel.

The legislative history and language of Section 14(e) clearly establish that Congress did not intend a requirement of specific intent to defraud. On the undisputed facts of this case, the Second Circuit held that petitioners' conduct met the standard of knowing falsehood or reckless disregard of the truth (A 35, Timbers, J.); that they acted with "recklessness that is equivalent to wilful fraud" (A 96, Gurfein, J.); and that they ignored "red flags" and "warning signals" (A 106, Mansfield, J.). Petitioners' conduct thus met all of the classic criteria of scienter, including the standard that is applied in criminal securities cases. On this record their protestations of a lack of scienter are, as the Second Circuit declared, "frivolous."

(4) *Causation*: Petitioners chafe at the application in this case of the *Mills-Ute** standard of causation recently approved by this Court in *TSC*. But here materiality was established by the strictest standards and causation was a matter of mathematics (the illegal 14½% made the difference). Petitioners are thus reduced to the speculation that *perhaps* they would have won if they had not violated the law. This Court has always rejected such cynical speculation by wrongdoers, who would seek to escape liability by resolving against their victims any uncertainties created by their own misconduct.

(5) *Damages*: Petitioners attack the Second Circuit's damage formula which measured the difference between pre-violation cost and post-violation value. That is the traditional standard. The Second Circuit gave petitioners the benefit of all doubts, including the assumption that Chris-Craft's minority block could have been registered and sold by January 1970. The court verified its computation by using the testimony of petitioners' expert as to the price

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* *Mills* v. *Electric Auto-Lite Co.*, 396 U.S. 375 (1970); *Affiliated Ute Citizens* v. *United States*, 406 U.S. 128 (1971).

that Chris-Craft's block would have yielded on a hypothetical private sale on September 5—a finding that further refutes petitioners' argument that the January 1970 public offering valuation was somehow unfair. The Second Circuit's damages were carefully tailored to the injury that petitioners caused Chris-Craft, and represented, as the Second Circuit noted, the "minimum" compensatory damages required by the record. There is no justification for a further remand in this seven-year litigation: the quantum of damages under the Second Circuit's formula was fully litigated in the district court, and the facts on which the Second Circuit relied were established beyond dispute.

(6) *The Claimed Amnesty for Investment Bankers*: First Boston argues that Section 11 of the 1933 Act shields it from liability in control contests, no matter what it says or does. But First Boston was found guilty of violating not Section 11, but Section 14(e), which imposes a far heavier burden of proof on plaintiffs. First Boston was held liable not for negligence but because it had actual knowledge of damaging facts and opted "to remain silent."

(7) *Joint and Several Liability*: Petitioners challenge the Second Circuit's holding that they are jointly and severally liable. But that result is hornbook law, because petitioners' combined acts inflicted a single injury on Chris-Craft—namely, the transformation of its commanding plurality into a useless minority.

Acceptance of petitioners' arguments would emasculate the securities laws and reduce control contests to a form of industrial warfare, contrary to Congress' intent in passing Section 14(e). It would place a premium on violating the law by allowing wrongdoers to keep their booty, while

denying their victims any compensation.* The Second Circuit's opinions, preventing that result, are correct. They effectuate Congress' intent. They work in the courts, with the *Chris-Craft* trilogy cited at least 50 times and no SEC intervention in control contests since *Chris-Craft*, because parties are now more law-abiding. They also work in the marketplace, with a dramatic increase in the number of control contests that were self-policing and did not require governmental interference. On all scores, the *Chris-Craft* opinions are sound. They should be affirmed.

ARGUMENT

I

PETITIONERS VIOLATED THE SECURITIES LAWS.

Petitioners' violations of the securities laws—found six years ago in *CC I* (*en banc*) and again in *CC II*—were not placed in issue by the certiorari petitions. Indeed, Bangor's petition specifically declares that it does not seek review as to the violations. Pet. for Bangor for Certiorari at 13-14. Nevertheless, now Bangor and the other petitioners suggest that they did not violate the spirit of the law. Such claims, not properly before the Court,** are without substance.

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* Indeed, here Bangor not only has retained its illegal majority position in Piper but claimed that its violations excused it from paying the Piper family its $13 million bonus (EV 1064).

** *Neely* v. *Eby Const. Co.*, 386 U.S. 317, 330 (1967); *J. I. Case Co.* v. *Borak*, 377 U.S. 426, 428 (1964); *Local 1976, United Brotherhood of Carpenters* v. *NLRB*, 357 U.S. 93, 96 n.1 (1958); *Irvine* v. *California*, 347 U.S. 128, 129-30 (1954) ("We disapprove the practice of smuggling additional questions into a case after we grant certiorari"); Sup. Ct. R. 40(1)(d)(2). Petitioners' pro forma footnotes in their reply briefs on certiorari disclaiming their concessions are not sufficient to make the violations an issue.

Rule 10b-6

Bangor asserts that its $9 million cash purchases of the critical 7½% blocks from Cornfeld *et al.* were only "technical" violations of Rule 10b-6 and did not offend the rule's policy goals; that, moreover, Bangor was an " 'innocent party' that 'did not then know of any rule or interpretation precluding the transactions' . . . and was advised by its lawyers that the purchases were lawful." Br. for Bangor at 51-52; *see also id.* at 17, 19, 24, 33-36, 54. Those are false claims.

To support the proposition that it did not know of the SEC's interpretation, Bangor quotes from a dissent in *CC I* in 1969. Br. for Bangor at 51. That is disingenuous. That statement was made on the preliminary injunction motion when Bangor's knowledge was not an issue. Thereafter, at the trial in *CC II*, Bangor stipulated that it knew of the SEC's May 5 release warning against cash purchases (App. 381).

Bangor's claimed reliance on counsel is equally false. Its counsel admitted at the trial in *CC II* that he cautioned top management against soliciting cash purchases. *See supra* at 13-14. The district court found that the large Cornfeld block was solicited in a special flight to the Bahamas (A 149), a finding Bangor never appealed. In addition, Bangor stipulated that it bought the other two large cash blocks from broker-dealers, a violation of Rule 10b-6 (A 149), without the participation of counsel and despite the fact that counsel had called to management's attention the specific provisions of the rule barring purchases from brokers (App. 1645-46, 1696-97). That deflates Bangor's pretense of innocence.

The SEC, of course, can pass prophylactic rules such as 10b-6 to brand particular practices *per se* violations,* and its construction of its rules is virtually conclusive.** Here, the SEC broadcast a clear warning in the midst of the battle. Bangor just chose not to obey.

Bangor also argues that its violation could not have had a market impact because its purchases were publicized. Br. for Bangor at 6. Curiously, it seeks support for this proposition in the district court's opinion which said that the purchases were innocent because they were kept secret (A 152). Bangor's arguments about market impact were fully aired before and firmly rejected by the Second Circuit sitting *en banc* in *CC I*. The court there pointed out that publicity aggravated the evils of Bangor's cash purchases when competing exchange offers were pending (C 17). Bangor specifically disclaimed any intention of seeking review of these conclusions in this Court. Pet. for Bangor for Certiorari at 13-14. Bangor's repetition of these sham arguments is an afterthought which cannot obscure the fact that it simply defied the SEC to clinch control.

If Bangor had really believed, as it now claims, Br. for Bangor at 53, that its $9 million cash purchases would

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* *Jaffee & Co.* v. *SEC*, 446 F.2d 387, 391 (2d Cir. 1971) (10b-6 has "prophylactic" intent and thus "[w]here the rule applies, its prohibition is absolute"); *SEC* v. *D'Onofrio*, [1975-76 Transfer Binder] CCH Fed. Sec. L. Rep. ¶95,201, at 98,018 (S.D.N.Y. 1975) ("Rule 10b-6 defines as manipulative *per se* certain conduct"); Comment, *The SEC's Rule 10b-6*, 1967 Duke L.J. 809, 817 & n.36 (Rule 10b-6's prohibitions are "absolute"). Indeed, in its certiorari petition in *CC II*, Bangor conceded "intent was irrelevant" under Rule 10b-6. Pet. for Bangor for Certiorari at 11 n. (1973).

** *United States* v. *National Association of Securities Dealers, Inc.*, 422 U.S. 694, 725 (1975); *Udall* v. *Tallman*, 380 U.S. 1, 16-17 (1965).

not have had a prohibited market impact, it could have resolved that matter honestly, because Rule 10b-6 provides:

> "(e) This rule shall not prohibit any transaction or transactions if the Commission, upon written request or upon its own motion, exempts such transaction or transactions, either unconditionally or on specified terms and conditions, as not constituting a manipulative or deceptive device or contrivance comprehended within the purpose of this Rule."

An application for an exemption would have been a prudent step for a law-abiding businessman to take before spending $9 million. But Bangor chose to take the law into its own hands. It secretly flew to Cornfeld in the Bahamas. Chris-Craft stayed home and obeyed the law.

The Second Circuit correctly ruled *en banc* six years ago that Bangor trampled on both the "letter" and "spirit" of Rule 10b-6 (C 18).

Section 14(e)

Bangor and the other petitioners also suggest that their misstatements and omissions did not offend the spirit of Section 14(e) because they were not "material." That argument, laid to rest four years ago in *CC II*, is fully answered by this Court's recent opinion in *TSC*. The Court, citing *CC II* as applying a similar test, stated:

> "[A]n omitted fact is material if there is a substantial likelihood that a reasonable shareholder would consider it important in deciding how to vote . . . . It does not require proof of a substantial likelihood that disclosure of the omitted fact would have caused the reasonable investor to change his vote. What the standard does contemplate is a showing of a substantial likelihood that, under all the circumstances, the omitted fact would have assumed actual significance in the deliberation of the reasonable shareholder. Put another way, there must be a substantial likelihood that the disclosure of the omitted fact would have been viewed by the reasonable investor as having significantly altered the 'total mix' of information made available." 96 S. Ct. at 2133 (footnote omitted).

The Second Circuit in *CC II* applied even a stricter test than *TSC* in determining materiality. It asked whether a reasonable stockholder "would" have considered misstatements important, not just whether there was "a substantial likelihood."*

As the lower courts found, there is more than "a substantial likelihood" that a reasonable shareholder would have considered it important, in deciding how to select between the competing Bangor and Chris-Craft packages, to know about the $13 million BAR loss. If disclosed, that loss would have wiped out 36% of Bangor's retained earnings and 12% of its stockholders' equity and converted its positive earnings-per-share into a red-ink figure (A 46; D 15). This news would have been particularly critical because the competing exchange offers were regarded by Piper shareholders as approximately equal in value. *See supra* at 20. The truth about BAR would have been devastating.

There is also no merit to the Piper insiders' suggestion that the omissions in their January letters and press re-

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* "Whether 'a reasonable man *would* attach importance [to the fact misrepresented] in determining his choice of action in the transaction in question' . . . . Account must be taken of all the surrounding circumstances to determine whether the fact under consideration is of such significance that a reasonable investor *would* weigh it in his decision whether or not to invest." (A 35) (emphasis added). *See also* A 38, 45-46.

leases were not material. Br. for Piper at 27-29. Calling an option a $20 million "commitment" and calling a $65 tender offer "inadequate" despite First Boston's advice that it was "fair" would surely change the total mix of information for a Piper stockholder who had to decide whether to accept a cash tender above market or follow management's advice. In fact, Piper's president conceded materiality by admitting that the Grumman maneuver was designed to discourage stockholders from accepting Chris-Craft's offer (A 135 n.6, 136, 61-62).

In short, petitioners' repeated violations are beyond any dispute.

II

CHRIS-CRAFT HAS STANDING.

Petitioners' central argument is that Chris-Craft lacks standing to complain although it was the victim of the violations. That contention, based on legislative history quoted out of context, rests on the erroneous premise that Section 14(e) was passed to protect *only* stockholders of the target company and that therefore rival contestants cannot sue. That contention, contradicted by petitioners' acknowledgment that management can sue, was correctly rejected below. The Second Circuit, like other courts and commentators, recognized that all participants in control contests have standing, in view of the language and legislative history of Section 14(e), the availability of implied actions for rivals in the analogous situation of proxy contests, and the established policy of encouraging private enforcement of the securities laws (A 24-33, 95, 102-103; B 40, n.30).

The full legislative history of Section 14(e) of the Williams Act, rather than petitioners' selective quotations, shows unmistakable congressional intent to afford standing to all participants in a control contest:

(1) While Congress was concerned about protecting shareholders, it also intended to place the rival contestants on an even footing and not "tip the balance" in favor of entrenched management.

(2) Congress intended that tender contests and proxy fights should be subject to the same ground rules and methods of enforcement—and in proxy battles, both sides have the right to police each other by private actions.

(3) During the hearings on the Williams bill, witnesses specifically called attention to *Borak** and other cases which recognized private damage actions as a necessary supplement to the SEC's limited enforcement capabilities.

(4) By 1970, when Congress strengthened Section 14(e), there had already been repeated recognition in cases and commentaries that all rivals in tender contests had standing under Section 14(e).

(5) Finally, the SEC, as Section 14(e)'s principal draftsman,** has always emphasized that all participants in control contests have standing—a contemporaneous and consistent interpretation entitled to great weight.

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* *J. I. Case Co.* v. *Borak*, 377 U.S. 426 (1964).

** *See* SEC Mem. on S. 2731 (89th Cong.), 112 Cong. Rec. 19,005 (Aug. 11, 1966).

Congressional desire to offer shareholders the option to tender at premium prices would be frustrated if the contestants lacked standing. No rational businessman would make a multi-million dollar offer, as here, if he were impotent to protect himself against foul tactics by his opponents. Protecting target stockholders and affording standing to contestants are thus harmonious objectives: indeed, the former depends upon the latter.

The Policy of Even-Handedness

The early legislative history refutes petitioners' argument that Section 14(e) was passed solely to protect shareholders. The policy of even-handedness among the rivals was a basic tenet of the new law from the outset. Thus, then-SEC Chairman Cohen, referring to recent Canadian tender offer legislation, wrote in 1966:

> "... The guiding principle of the drafters of this legislation [the Canadian tender law] was set out in ... the Kimber Report. It states: 'Shareholders should have made available to them, as a matter of law, sufficient up-to-date relevant information to permit them to come to a reasoned decision as to the desirability of accepting a bid for their shares.' This, however, must be balanced against the need to insure that new regulations do 'not unduly impede potential bidders or put them in a commercially disadvantageous position vis-a-vis an entrenched and possibly hostile board of directors of an offeree company.'
>
> "In considering the provisions of the pending bills to regulate tender offers, we agreed with the Kimber Report that this balancing of interests is appropriate."*

* Manuel F. Cohen, *A Note on Takeover Bids and Corporate Purchases of Stock*, 22 Bus. Lawyer 149, 152 (1966).

The dual policy of protecting shareholders and rival contestants permeated congressional consideration of the Williams Act. *See* 113 Cong. Rec. 854-55 (Jan. 18, 1967), 24,664 (Aug. 30, 1967) (Sen. Williams); *Senate Hearings** at 3 (Sen. Williams); *id.* at 16, 34, 178, 205 (Cohen). The House and Senate Reports on the Williams Act both state:

> "The bill avoids tipping the balance of regulation either in favor of management or in favor of the person making the takeover bid. It is designed to require full and fair disclosure for the benefit of investors while at the same time providing the offeror and management equal opportunity to fairly present their case." S. Rep. No. 550, 90th Cong., 1st Sess. 3 (1967); H.R. Rep. No. 1711, 90th Cong., 2d Sess. 4 (1968).

This Court recently stressed this policy of even-handedness in *Rondeau*:

> "The Congress expressly disclaimed an intention to provide a weapon for management to discourage takeover bids or prevent large accumulations of stock which would create the potential for such attempts. Indeed, the Act's draftsmen commented upon the 'extreme care' which was taken to avoid tipping the balance of regulation either in favor of management or in favor of the person making the takeover bid. S. Rep. No. 550, 90th Cong., 1st Sess., 3 (1967); H.R. Rep. No. 1711, 90th Cong, 2d Sess., 4 (1968). *See also Electronic Specialty Co.* v. *International Controls Corp.*, 409 F.2d 937, 947 (CA 2 1969)." 422 U.S. at 58-59.**

* *Hearings on S. 510 before the Subcomm. on Securities of the Senate Comm. on Banking and Currency*, 90th Cong., 1st Sess. (1967) (*"Senate Hearings"*).

***See also GAF Corp.* v. *Milstein*, 453 F.2d 709, 717, n.16, 718, n.19, 719-20 (2d Cir. 1971) (Kaufman, C.J.), *cert. denied*, 406 U.S. 910 (1972).

Congress was thus intent on establishing a code of fair conduct which would prevent abuses by management as well as tender offerors. Denial of standing to an offeror would tip the balance in favor of management and its allies, which could then violate the law without fear of reprisal and without incurring liability for the injury to the offeror.

Widespread Recognition of Private Actions Prior to the Williams Act

The precedents prior to the Williams Act, while recognizing implied actions, did not adequately cover tender contests. This was a gap that had to be filled by the Williams Act.

The courts had long upheld actions by buyers and sellers under Section 10(b) of the 1934 Act.* Moreover, in control contests waged by proxies, the courts had recognized implied actions under Section 14(a) for stockholders, management, and rival contestants.** By 1968, it was settled law that there was a private right of action

* *See Blue Chip Stamps* v. *Manor Drug Stores,* 421 U.S. 723, 730 (1975); *and see, e.g., Kardon* v. *National Gypsum Co.,* 69 F. Supp. 512 (E.D. Pa. 1946).

** Stockholders: *J. I. Case Co.* v. *Borak,* 377 U.S. 426 (1964); *General Time Corp.* v. *Talley Indus., Inc.,* 403 F.2d 159, 161 (2d Cir. 1968), *cert. denied,* 393 U.S. 1026 (1969). Management: *Studebaker Corp.* v. *Gittlin,* 360 F.2d 692 (2d Cir. 1966). *Accord, General Time Corp.* v. *Talley Indus., Inc., supra; Greater Iowa Corp.* v. *McLendon,* 378 F.2d 783, 794 (8th Cir. 1967). Rivals: *Union Pacific R.R.* v. *Chicago & North Western Ry.,* 226 F.Supp. 400 (N.D. Ill. 1964), cited with approval by this Court in *Mills* v. *Electric Auto-Lite Co.,* 396 U.S. 375, 385 (1970), and by Judge Friendly in *Electronic Specialty Co.* v. *International Controls Corp.,* 409 F.2d 937, 946 (2d Cir. 1967).

in proxy contests. The courts recognized that the opportunity for informed decisions by public shareholders—the goal shared by both proxy and tender regulation—could be assured only if both the insurgents and incumbent management had a right to police each other's conduct.

In the mid-1960's, however, proxy contests were superseded by a new and more popular technique for acquiring control—tender offers. But there was a "no man's land" in the law, because Section 14(a)'s proxy provisions did not apply to tender offers and Section 10(b)'s "buyer-seller" requirement limited its applicability.* Congress passed the Williams Act to subject tender contests to the same rules as proxy contests.** As the Commission stated shortly after the passage of the Act:

> "We are of the view that this new legislation was clearly intended to provide the same scope of protection as the existing proxy rules of Section 14. Our position was made clear in the Senate and House hearings and, we submit, was adopted by the committees in their respective reports. In testifying about the proposed bill, Chairman Manuel F. Cohen of the Commission repeatedly analogized the tender offer situation to a proxy dispute, and urged that 'the need for protec-

* *See* discussion in *GAF Corp.* v. *Milstein,* 453 F.2d 709, 717 (2d Cir. 1971), *cert. denied,* 406 U.S. 910 (1972); *Crane Co.* v. *Westinghouse Air Brake Co.,* 419 F.2d 787, 797-98 (2d Cir. 1969), *cert. denied,* 400 U.S. 822 (1970); *Iroquois Indus., Inc.* v. *Syracuse China Corp.,* 417 F.2d 963 (2d Cir. 1969), *cert. denied,* 399 U.S. 909 (1970); *Electronic Specialty Co.* v. *International Controls Corp.,* 409 F.2d 937, 945-46 (2d Cir. 1969).

** *See* H.R. Rep. No. 1711, *supra,* at 3; S. Rep. No. 550, *supra,* at 3; 113 Cong. Rec. 854 (Jan. 18, 1967) (Sen. Williams); *Senate Hearings* at 16, 21 (Cohen). Senator Williams stated, "This legislation is patterned on the present law and regulations that govern proxy contests." 113 Cong. Rec. 24,665 (Aug. 30, 1967). *See also* Cohen, *A Note on Takeover Bids and Corporate Purchases of Stock, supra,* 22 Bus. Lawyer at 153.

> tion may be greater in the case of a tender offer.' . . . We believe it would be anomalous to conclude that Congress did not intend the same scope of protection for all situations arising under Section 14, absent any expression to the contrary."*

Thus the proxy precedents implying a private right of action for all participants are of particular significance in interpreting Section 14(e).

Discussion of Private Actions During Hearings on Williams Act

While Congress is presumed to be aware of judicial precedents** such as *Borak* which recognized implied actions under Section 14(a), there is no need to rely on presumptions here because private actions were openly discussed at the hearings.

Professor Painter of the University of Missouri Law School told the Senate Committee that the language of Section 14(e) would be construed to permit private actions, *Senate Hearings* at 140, and urged that Section 14(e) be made the exclusive remedy "for investors and others" in tender contests. *Id.* at 141.

Professor Israels of Columbia Law School called specific attention to *Borak* and stated that it could be assumed that similar actions would be implied under Section 14(e).† *Id.* at 67.

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* Brief for SEC as *Amicus Curiae* at 8-9, *Electronic Specialty Co.* v. *International Controls Corp.*, 295 F. Supp. 1063 (S.D.N.Y.), *aff'd in part and rev'd in part*, 409 F.2d 937 (2d Cir. 1969).

** *See, e.g., Electronic Storage Battery Co.* v. *Shimadzu*, 307 U.S. 5, 14 (1939).

† Bangor errs when it states that *Borak* was not mentioned in the deliberations on the Williams Act. Br. for Bangor at 37 n. *See, e.g., Senate Hearings* at 67, 140.

Chairman Cohen, who had previously stressed the need to strike a balance between the tenderor and management, repeated before Congress: "I should indicate, however, that the shareholders are not the only persons concerned." He referred to the plight of takeover bidders faced by unfair tactics by entrenched management, *Senate Hearings* at 178, which could wield "powerful weapons . . . with impunity provided its activities fall short of fraud." *Id.* at 183. He emphasized that the SEC was ill-equipped to police the accelerating number of control contests because of its limited manpower and the time pressures involved.* He noted that "litigation alleging fraud by one side or the other in a contested tender offer occurs almost weekly."**

Chairman Cohen warned, however, that it was questionable whether existing law covered misleading announcements by management and stated that any doubt on this score in connection with tender contests would be put to

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* *Hearings on H.R. 14,475 Before the Subcomm. on Commerce and Finance of the House Comm. on Interstate and Foreign Commerce*, 90th Cong., 1st Sess. at 19 (1968) (*"House Hearings"*). *See also* Cohen, *The Development of Rule 10b-5*, 23 Bus. Lawyer 593, 597 (1968), stressing that private rights of action were important if not indispensable to aid the SEC and to enforce the securities laws; *Borak*, 377 U.S. at 432.

** There were also discussions at the hearings about the battle for control between Crane Co. and American Standard, Inc. for Westinghouse Air Brake Co., and the then-pending litigation it fostered, *House Hearings* at 22-30, in which the tenderor was subsequently found to have standing. *See infra* at 46-47. The *Mills* v. *Sarjem*, 133 F. Supp. 753 (D.N.J. 1955), proxy-tender litigation was also noted. *Senate Hearings* at 143; *House Hearings* at 59.

rest by Section 14(e).* Shortly after Section 14(e)'s passage in July 1968, the SEC in amicus briefs in two major cases reaffirmed this view that the new Section 14(e) was intended to confer standing on both tender offerors and management. *See infra* at 48.

In addition, while the Williams bill was being debated there were contemporaneous articles stating that if Section 14(e) was passed, it would confer standing on management and rival bidders. This point was emphasized, for example, in a March 1968 symposium of securities law experts reported in The Business Lawyer in July 1968 and in a May 1968 article in the Harvard Journal of Legislation.** Similar articles appeared immediately after Section 14(e)'s passage.†

* *House Hearings* at 59. In a June 26, 1968 letter to the House Committee, Chairman Cohen expressed the SEC's view that "existing controls in this area are inadequate" because of Section 10(b)'s buyer-seller limitation, which courts had construed as allowing Section 10(b) actions for fraud in corporate announcements only when the corporation has "itself been trading in securities." *Id.*

** Kennedy, *Tender Moment*, 23 Bus. Lawyer 1091, 1114 (1968) ("If adopted, this Section would eliminate one of the obstacles to suits presently brought under Rule 10b-5 by permitting anyone, not only purchasers or sellers, to bring actions in the Federal Courts against anyone who commits fraud in connection with a tender offer or any solicitation for or against a tender offer."); Swanson, *S. 510 and the Regulation of Cash Tender Offers: Distinguishing St. George From the Dragon*, 5 Harv. J. Legis. 431, 444 (1968).

† Professor Mundheim of the University of Pennsylvania Law School, a witness at the hearings, noted that Section 14(e) provided "a basis for suits by offerors against target companies." Mundheim, *Tender Offers*, 2 Rev. of Securities Regulations 953, 956 (Feb. 3, 1969). And in April, 1970, the Vanderbilt Law Review, in another symposium on securities laws, stated that the statute gave "standing to non-tendering shareholders, target corporations, and the offeror." Note, *The Williams Amendments: An Evaluation of the Early Returns*, 23 Vand. L. Rev. 700, 710 (1970). *See also* Bromberg, *The*

(footnote continued on next page)

In short, during the deliberations on Section 14(e), the air was laden with the concept of private enforcement by the parties to tender contests. In contrast, as this Court noted in *Blue Chip*, a private action was implied under Section 10(b) in the absence of any affirmative expression of congressional intent.*

Broad Statutory Language of Section 14(e)

The language of the statute—the ultimate evidence of congressional intent**—reflects a conscious decision to equate tender and proxy contests and to eliminate Section 10(b)'s buyer-seller restriction as an obstacle to private actions in tender contests. Unlike Section 10(b), which prohibits fraud and manipulative acts "in connection with the purchase or sale of any security," Section 14(e) bans inadequate disclosure, fraud or manipulation

Securities Law of Tender Offers, 15 N.Y.L.F. 459, 554 (1969); Hamilton, *Some Reflections on Cash Tender Offer Legislation*, 15 N.Y.L.F. 269, 291-92 (1969); Krasik, *Tender Offers: The Target Company's Duty of Disclosure*, 25 Bus. Lawyer 455, 458 (1969). And *see* Note, *Cash Tender Offers*, 83 Harv. L. Rev. 377, 398-99 (1969):

> "Congress intended not only to protect investors, but also to assure that struggle for control between offeror and incumbents would proceed fairly . . . . Both target companies and offerors have an interest in confining their adversaries to fair conduct, lest they suffer defeat because of practices which they are legally or ethically barred from meeting in kind. Affording standing to the offeror would, moreover, serve the legislative purpose 'to avoid tipping the balance of regulatory burden in favor of management . . . .' Future courts should extend *Electronic Specialty's* liberal standing doctrine to the offeror in suit against the target [citing *Union Pacific, supra*]."

* 421 U.S. at 729. Indeed, the seminal *Kardon* case said that such an action should be implied under a remedial statute in the absence of a negative expression by Congress. 69 F. Supp. 512, 514 (E.D. Pa. 1946).

** *Ernst & Ernst* v. *Hochfelder*, 96 S. Ct. 1375, 1383 (1976).

> "in connection with any tender offer or request or invitation for tenders, or any solicitation of security holders in opposition to or in favor of any such offer, request, or invitation."

This expansive language—passed after Section 10(b)'s "buyer-seller" restrictions had been called to Congress' attention*—shows that Congress intended to afford standing to all parties in control contests and not tip the balance.

Cases Recognizing Implied Action Immediately After Passage of Section 14(e)

Shortly after Section 14(e)'s enactment, the courts recognized that it gave tenderors and management private actions in tender battles just as in proxy fights. *Butler Aviation International, Inc.* v. *Comprehensive Designers, Inc.*, 425 F.2d 842, 843 n.1 (2d Cir. 1970); *Crane Co.* v. *Westinghouse Air Brake Co.*, 419 F.2d 787, 798-99 (2d Cir. 1969), *cert. denied*, 400 U.S. 822 (1970); *Iroquois Industries, Inc.* v. *Syracuse China Corp.*, 417 F.2d 963, 969 (2d Cir. 1969), *cert. denied*, 399 U.S. 909 (1970); *Electronic Specialty Co.* v. *International Controls Corp.*, 409 F.2d 937, 946 (2d Cir. 1969).

In *Crane*, a defeated tenderor in a close race, like Chris-Craft, was granted standing to claim damages against its

* Chairman Cohen informed Congress of standing limitations under Section 10(b). *See supra* at 44, n.†. *See also Fleischer & Mundheim, Corporate Acquisition by Tender Offer*, 115 U. Pa. L. Rev. 317, 361-62 (1967); Kennedy, *Tender Moment*, 23 Bus. Lawyer 1091, 1114 (1968) (from a March 1968 speech); Swanson, *S. 510 and the Regulation of Cash Tender Offers: Distinguishing St. George From the Dragon*, 5 Harv. J. Legis. 431, 444 (1968) ("[T]he offeror will find it difficult to seek redress for misstatements by private action under 10b-5 because the deception, if effective, would not have caused injury to the offeror in the purchase or sale of a security.").

rivals, which had won by unfair tactics. While standing in *Crane* was recognized under Rule 10b-5's "forced seller" theory rather than under Section 14(e), which was not effective at the date of the transactions involved, the Second Circuit (Lumbard, Kaufman, Smith, JJ.) pointed out that Section 14(e) "should serve to resolve any doubts about standing in the tender offer cases, even where the offeror is not, as is Crane, in the position of a forced seller." 419 F.2d at 798-99. And in *Iroquois,* the Second Circuit (Lumbard, Anderson, Wyatt, JJ.), while denying standing to a tenderor under Rule 10b-5, indicated that the tenderor would have had standing under Section 14(e) if it had been in effect at the time of the transaction involved. 417 F.2d at 969.*

In *Electronic Specialty* (Friendly, Feinberg, Moore, JJ.) and *Butler* (Friendly, Lumbard, Judd, JJ.), the Second Circuit upheld the standing of management of a target company and again indicated that a tenderor like Chris-Craft would have an implied action in order to avoid tipping the balance. Judge Friendly stated in *Electronic Specialty*:

> "In effect this [§14(e)] applies Rule 10b-5 both to the offeror and to the opposition—very likely, except perhaps for any bearing it may have on the issue of standing, only a codification of existing case law. See Jennings and Marsh, Securities Regulation: Cases and Materials 912 (2d ed. 1968)." 409 F.2d at 940-41.

The defendant in *Electronic Specialty,* challenging the standing of the target company, made the same claim as petitioners here that "the focus of the legislative interest was on the public shareholder." 409 F.2d at 945. But

* Bangor distorts *Iroquois* by stopping its quotation from that opinion just short of the sentence recognizing standing. Br. for Bangor at 49.

Judge Friendly, citing the *Union Pacific* case, which granted standing to a rival in a proxy control contest, stated:

> "In determining who has standing to enforce duties created by statute, a court's quest must be for what will best accomplish the purposes of the legislature. . . . Militating in favor of an affirmative answer [i.e., granting standing] is the very fact of the superior resources of the corporation, which can be vital in this context where remedial action must be speedy and forceful." 409 F.2d at 946.*

These four cases received widespread publicity in the *Wall Street Journal* and legal periodicals.**

SEC Construction of the Statute

As noted before, the Commission, the chief draftsman of Section 14(e), has consistently stated that the new statute was intended to permit both management and the tenderor to bring private actions—just as in proxy contests under Section 14(a). It said so in *amicus* briefs in *Electronic Specialty*,† *Iroquois*‡ and in this case.¶

* This point was also emphasized in *H. K. Porter Co.* v. *Nicholson File Co.*, 482 F.2d 421, 424 (1st Cir. 1973); *GAF Corp.* v. *Milstein*, 453 F.2d 709, 719 (2d Cir. 1971), *cert. denied*, 406 U.S. 910 (1972).

** The progress of these cases was reported in the *Wall Street Journal* from the filing of the complaints to the denial of certiorari. *See, e.g., Iroquois*: Sept. 25, 1968 at 8; June 23, 1970 at 6; *Crane*: April 10, 1968 at 14; April 18, 1968 at 7; May 7, 1968 at 14; June 3, 1968 at 30; June 4, 1968 at 8; June 5, 1968 at 7; June 7, 1968 at 8; June 25, 1968 at 10; Oct. 13, 1970 at 40; *Butler*: Nov. 24, 1968 at 14; *Electronic Specialty*: Sept. 12, 1968 at 31; Dec. 20, 1968 at 9.

† Brief for SEC as *Amicus Curiae* at 8-9, 12, United States District Court for the Southern District of New York (Dec. 1968).

‡ Brief for SEC as *Amicus Curiae* at 23-26, Court of Appeals for the Second Circuit (Feb. 1969).

¶ Brief for SEC as *Amicus Curiae* at 11-12, Court of Appeals for the Second Circuit (May 1972).

The courts show great deference to a contemporaneous and consistent construction of a statute by the agency charged with its enforcement. *United States* v. *National Association of Securities Dealers, Inc.*, 422 U.S. 694, 717-19 (1975); *NLRB* v. *Boeing Co.*, 412 U.S. 67, 75 (1973); *Udall* v. *Tallman*, 380 U.S. 1, 16-17 (1965). And even greater weight is given to an agency's construction when, as here, the agency helped draft the legislation. *Zuber* v. *Allen*, 396 U.S. 168, 192 (1969): "Its impact [the agency's construction] carries most weight when the administrators participated in drafting and directly made known their views to Congress in committee hearings."

1970 Amendment of Section 14(e)

In December 1970, after repeated statements by the courts, commentators and the Commission that all participants in tender contests have rights of action, Congress reconsidered the Williams Act. It did not reject these precedents on standing. Instead, it strengthened the Act.* Indeed, Senator Williams referred to the need to deter counter-maneuvers by management in tender offers.**

* *See* Pub. L. No. 91-567; 116 Cong. Rec. 29,252 (Aug. 18, 1970); H.R. Rep. 1655, 91st Cong., 2d Sess. 2, 4 (1970).

** Thus, in 1970, Senator Williams made the following comments, which appear to describe the facts of *Crane*: "The techniques currently being used in these offers have become increasingly sophisticated and they change rapidly. This is particularly true when a takeover is resisted by incumbent management. In some instances industrial warfare occurs. Claims and counterclaims, charges and countercharges are hurled back and forth. Efforts are made to influence the price of securities involved. By granting this additional rulemaking authority the Congress would allow the Commission to deal promptly and with flexibility with these problems." 116 Cong. Rec. 29,252 (Aug. 18, 1970).

Congressional reaffirmation of Section 14(e) against the foregoing background—the four recent and well-publicized Second Circuit decisions, the contemporaneous interpretation by the SEC and the commentators, and Congress' own knowledge of the bitter litigations—dramatically confirms the original congressional intent to grant tender offerors and management the power to police their own control contests. This Court has previously held that judicial or administrative interpretation of a statute, followed by congressional reenactment of it, "is deemed to have received congressional approval and has the effect of law." *Commissioner* v. *Noel Estate,* 380 U.S. 678, 682 (1965); *Electronic Storage Battery Co.* v. *Shimadzu,* 307 U.S. 5, 14 (1939).*

Precedents Recognizing an Implied Action for Tenderors and Management

In view of the foregoing legislative history, the courts have uniformly recognized standing for contestants and management, as well as stockholders, in control contests. The rationale of the Second Circuit's *Crane-Electronic Specialty-Iroquois-Butler* quartet has been widely followed, not only in *Chris-Craft,* but in cases in other circuits.

Thus, the First Circuit, citing *Chris-Craft* with approval, upheld the right of a defeated tenderor to sue for damages in *H. K. Porter Co.* v. *Nicholson File Co.,* 482 F.2d 421 (1st Cir. 1973). The court there (Coffin, McEntee and

* *See also Dragor Shipping Corp.* v. *Union Tank Car Co.,* 371 F.2d 722, 726 (9th Cir. 1967); *Sherman* v. *Hamilton,* 295 F.2d 516, 520 (1st Cir. 1961), *cert. denied,* 369 U.S. 820 (1962); *In re Wisconsin Co-Operative Milk Pool,* 119 F.2d 999, 1002 (7th Cir.), *cert. denied,* 314 U.S. 655 (1941).

Campbell, JJ.) rejected the very argument—now made by petitioners here—that only stockholders of the target may sue under Section 14(e):

> "From the statutory scheme and the legislative history, it seems clear that the overriding purpose of §14(e) is the protection of the investor. Yet affording for the offeror and the target's management a cause of action for damages would in many instances further that purpose. With an obvious economic stake in the outcome of the tender offer battle, they have the incentive to detect violations and vigorously pursue remedies. *See* Bromberg, Securities Law, *supra,* §6.3(1040) at 124. Nicholson concedes Porter's right to sue in equity; but the threat of a damages action no less than an equitable suit may stimulate compliance, to the benefit of the investor. The Supreme Court said in *Borak* that '[p]rivate enforcement of the proxy rules provides a necessary supplement to [Securities & Exchange] Commission action . . . [T]he possibility of civil damages or injunctive relief serves as a most effective weapon in the enforcement of the proxy requirements.' 377 U.S. at 432, 84 S.Ct. at 1560. This proposition is no less applicable to the tender offer situation. We see no reason why actions by the protagonists in the battle, as well as by the stockholders themselves, would not be effective enforcement weapons." 482 F.2d at 424.

In *Sargent* v. *Genesco, Inc.,* 492 F.2d 750, 769 (5th Cir. 1974), and *Smallwood* v. *Pearl Brewing Co.,* 489 F.2d 579, 596, n.20 (5th Cir.), *cert. denied,* 419 U.S. 873 (1974), the Fifth Circuit also specifically approved *Chris-Craft's* rationale on standing. Bangor selectively quotes two disjointed passages from *Sargent* in order to create the impression that the Fifth Circuit stated that Section 14(e)'s

concern was limited to shareholders. Br. for Bangor at 43-44. By use of ellipses, Bangor omits the following language from the opinion:

> "Although section 14(e) does not expressly provide for a private right of action, courts have uniformly implied one. *See* Smallwood v. Pearl Brewing Co., *supra*, 489 F.2d at 596, n. 20. In determining who has standing to sue under 14(e), the quest has been for what will best further the objective of the statute. Consequently, the right to bring suit has not been limited to tendering offerees only but has been extended to numerous other parties who claimed to be victims of 14(e) violations. *See* Chris-Craft Industries, Inc. v. Piper Aircraft Corp., 480 F.2d 341 (2d Cir. 1973) (tender offeror had standing to sue target company's management and competing offeror); Electronic Specialty Company v. International Controls Corp., 409 F.2d 937 (2d Cir. 1969) (target company and target company's nontendering shareholders had standing to sue for injunctive relief); H.K. Porter, Inc. v. Nicholson File Co., 482 F.2d 421 (1st Cir. 1971) (tender offeror had standing to sue target company's management); *see also* Gulf and Western Industries, Inc. v. Great Atlantic and Pacific Tea Company, 476 F.2d 687 (2d Cir. 1973); *but see* Washburn v. Madison Square Garden Corp., 340 F.Supp. 504 (S.D.N.Y. 1972)." 492 F.2d at 769.*

Other courts have also upheld the standing of tenderors. *See, e.g., Alaska Interstate Co.* v. *McMillan,* 402 F. Supp. 532 (D. Del. 1975) (standing of a tenderor in a struggle between two public companies); *Dyer* v. *Eastern Trust &*

* The court in *Sargent* refused to give standing to shareholders of a class of stock not the subject of the offer—strangers to the transaction.

Banking Co., 336 F. Supp. 890 (D. Me. 1971) (Gignoux, J.) (shareholder of tender offeror).*

Moreover, precedents under Section 13(d) of the Williams Act also recognize standing for all parties, including management and offerors, in control contests. *See, e.g., Rondeau* v. *Mosinee Paper Co.,* 422 U.S. 49 (1975); *GAF Corp.* v. *Milstein,* 453 F.2d 709 (2d Cir. 1971), *cert. denied,* 406 U.S. 910 (1972); *Alaska Interstate Co.* v. *McMillan,* 402 F. Supp. 532 (D. Del. 1975); *Jewelcor, Inc.* v. *Pearlman,* 397 F. Supp. 221 (S.D.N.Y. 1975). In *GAF,* the Court noted that *Borak's* recognition of private suits to supplement the SEC's activities "is part of the ABC's of securities laws." 453 F.2d at 719. *See also id.* at 721.

Thus, the Williams Act has repeatedly been construed by courts and commentators** to provide a private action for all participants in control contests. The point is so

* Judge Gignoux stated, "Unlike Section 10(b), Section 14(e) contains no hint of a purchaser-seller requirement. The decided cases under Section 14(e) have granted standing to claim its protection to the corporation which is the target of the takeover bid . . . ; to nontendering shareholders . . . , and to the tender offeror itself . . . ." 336 F. Supp. at 914 (citations omitted).

** *See* Aranow & Einhorn, *Tender Offers for Corporate Control* 286-88 (1973); 1 Bromberg, *Securities Law, Fraud: SEC Rule 10b-5,* §§6.3(1000)-(1040) (1975); Jennings & Marsh, *Securities Regulation: Cases and Materials* 937 (3d ed. 1972); Binder, *The Securities Law of Contested Tender Offers,* 18 N.Y.L.F. 569, 627 (1973); Bromberg, *The Securities Law of Tender Offers,* 15 N.Y. L.F. 459, 554 (1969); Dugan & Fairfield, *Chris-Craft Corp.* v. *Piper Liability Aircraft Corp.: Liability in the Context of a Tender Offer,* 35 Ohio St. L.J. 412 (1974); Hamilton, *Some Reflections on Cash Tender Offer Legislation,* 15 N.Y.L.F. 269, 291-92 (1969); Kennedy, *Tender Moment,* 23 Bus. Lawyer 1091, 1114 (1968); Krasik, *Tender Offers: The Target Company's Duty of Disclosure,* 25 Bus. Lawyer

(footnote continued on next page)

well established that standing is not even raised in cases today. Against the foregoing background, it is not surprising that petitioners have been able to dredge up only *one* case which even questions the standing of a tenderor—a dictum statement which is distinguishable and, in any event, against the overwhelming weight of authority.*

455, 458 (1969); Mundheim, *Tender Offers*, 2 Rev. of Securities Regulation 953, 956 (1969); Young, *Judicial Enforcement of the Williams Amendments: The Need to Separate the Questions of Violations and Relief*, 27 Bus. Lawyer 391, 398-99 & n.30 (1972); *Current Problems Under the Securities Acts—The Expanding Uses of Rule 10b-5*, 10 B.C. Ind. & Com. L. Rev. 313, 332 (1969); *Takeover Bids: Proceedings of Meeting Held in Lloyd's Writing Room, London, on Tuesday, 20 July 1971*, 27 Bus. Lawyer 243, 250 (1971) (S. Butler speaking); Note, *Chris-Craft and Loss of Opportunity to Control: The Lost Opportunity*, 43 Fordham L. Rev. 820, 821 (1975) ("While doubt surrounded the standing of target corporations and competing tender offerors to sue another tender offeror under 10b-5, such plaintiffs clearly have standing under Section 14(e)."); Comment, *Remedies for Defrauded Tender Offerors Under Section 14(e) of the Securities Exchange Act of 1934*, 62 Geo. L.J. 1693, 1695-96 (1974); Note, *The Developing Meaning of "Tender Offer" Under the Securities Exchange Act of 1934*, 86 Harv. L. Rev. 1250, 1260 (1973); Note, *Cash Tender Offers*, 83 Harv. L. Rev. 377, 398-99 (1969); Comment, *Tender Offers: The Liberalization of Standing Requirements Under Section 14(e)*, 7 U. San Fran. L. Rev. 561 (1973); Note, *The Williams Amendments: An Evaluation of the Early Returns*, 23 Vand. L. Rev. 700, 710, 713-17 (1970); 51 Texas L. Rev. 1444, 1447-48 (1973); 19 Vill. L. Rev. 671 (1974).

* *Klaus* v. *Hi-Shear Corp.*, 528 F.2d 225 (9th Cir. 1975), is distinguishable, as pointed out in the Solicitor General's brief in opposition to certiorari. Brief for the United States as *Amicus Curiae* Opposing Certiorari at 18, n.9. *Klaus* denied a preliminary injunction because of lack of a showing of irreparable injury. If plaintiff had no standing, the court would never have reached the issue on the injunction. Moreover, the defendant target-company in that case conceded that the offeror had standing and a right to seek damages, which made injunctive relief unnecessary. Brief for Hi-Shear Corp., Dkt. No. 75-1544, at 46; Brief for Hi-Shear Corp., Dkt. No. 75-2380, at 49. In any event, *Klaus* rests primarily on the panel's interpretation of *Rondeau* v. *Mosinee Paper Corp.*, 422 U.S. 49 (1975). But *Rondeau* supports Chris-Craft's standing: it stresses the importance of even-handedness in tender contests and of private enforcement of the securities laws.

Petitioners also misplace their reliance on *Cort*.* There, the Court, while finding no private right of action under the Federal Election Campaign Act, explicitly contrasted and approved the private right of action provided by *Borak* for proxy contests. Significantly, *Borak* wrote on a slate clear of legislative history, not one replete with the evidence of congressional intent present here. The considerations that led the Court to imply a private action in *Borak* on behalf of the corporation demand even more so that standing be afforded to the participants in analogous tender contests.

Petitioners' Other Arguments as to Standing

1. *Rule 10b-6*: In *CC I*, the Second Circuit *en banc* held that Chris-Craft could obtain relief under Rule 10b-6 because of Bangor's $9 million cash purchases of critical blocks from Cornfeld and others (C 18). Chris-Craft's standing under Rule 10b-6 was expressly reaffirmed by the district court and Second Circuit in *CC II* (A 65, 132). Bangor did not even claim on appeal in *CC II* that Section 10(b)'s purchaser-seller requirement immunized its illegal purchases. Nor did it raise that argument in its certiorari petition in *CC II*.

Now, however, Bangor asserts that Chris-Craft cannot sue because it was not a "buyer" under *Blue Chip* with respect to the 120,000 critical shares which Bangor illegally bought for cash. Br. for Bangor at 32. Of course, Chris-Craft did not buy those shares: it could not have done so without violating Rule 10b-6. It offends public policy to argue that Chris-Craft lacks standing because it

* *Cort* v. *Ash*, 422 U.S. 66 (1975).

obeyed the law, while its rival could buy the key blocks with impunity by violating the law.

Bangor's argument stands *Blue Chip* on its head. In *Blue Chip,* this Court held that a plaintiff who had invested no money in the marketplace could not sue on the speculative theory that he might have purchased stock if the issuer had not painted such a pessimistic picture of the company's prospects. This Court, concerned about "vexatious" suits by bystanders, held that Rule 10b-5 did not permit actions unless the plaintiffs were actual buyers or sellers of stock. Here, Chris-Craft was not a bystander but a buyer: it invested $60 million to buy 700,000 shares. Moreover, at the time of Bangor's illegal acquisitions, Chris-Craft had an outstanding exchange offer for more Piper shares. Having illicitly preempted key Piper shares, Bangor cannot equate Chris-Craft with a passive bystander.

Reliance on *Blue Chip,* in any event, is misplaced because here Section 14(e) provides an independent basis for standing. Section 14(e) prohibits any "manipulative acts" which take place "in connection with" control contests. Violations of Rule 10b-6, by definition, are "manipulative acts" and are therefore covered by Section 14(e).*

There is no basis for Bangor's *ipse dixit* claim that even though its purchases are illegal "manipulative acts" under Rule 10b-6, they cannot be illegal manipulative acts under Section 14(e). Br. for Bangor at 35. In passing

* The Solicitor General in his *amicus* brief on certiorari made the same point. Brief for the United States as *Amicus Curiae* Opposing Certiorari at 17.

Section 14(e), Congress meant to stop all unfair tactics and not leave loopholes for ingenious schemes.* While both Sections 10(b) and 14(e) ban manipulative acts, different sections of the securities laws often "overlap" and this "is neither unusual nor unfortunate." *SEC* v. *National Securities, Inc.,* 393 U.S. 453, 468 (1969).** Clearly conduct which the SEC has branded "manipulative" per se was well within the intent of Congress in adopting Section 14(e).

2. *Cash Tenders*: Petitioners' suggestion (Br. for Bangor at 37; Br. for First Boston at 26), that Section 14(e) applies only to cash offers and not to exchange offers was rejected by Congress. Thus, the final House and Senate Reports state that Section 14(e) applies to tender offers "whether for cash, securities or other considerations."† A proposed exemption from Section 14(e) for registered exchange offers was deleted at the urging of the Commission on the ground, *inter alia,* that the antifraud provisions of the 1933 Act "do not extend to solicitation by management or by third persons in opposition to the tender offer"—the very situation presented by this case. *Senate Hearings* at 18, 38, 41.

3. *Alleged Injury to Piper Shareholders*: Petitioners argue that recovery of damages against Bangor will penalize former Piper stockholders who accepted the Bangor ex-

* *See, e.g., Senate Hearings* at 18, 21-22, 182, 183.

** Congress was aware of the overlap between Section 14(e) and rules promulgated under Section 10(b), *e.g., Senate Hearings* at 110, 119, 140-46, 210; 114 Cong. Rec. 21,484 (July 15, 1968) (Rep. Moss), including, specifically, Rule 10b-6. *Senate Hearings* at 131.

† S. Rep. No. 550, 90th Cong., 1st Sess. 11 (1967); H.R. Rep. No. 1711, 90th Cong., 2d Sess. 11 (1968).

change offer, contrary to the Williams Act's intent to protect shareholders. But those Piper public stockholders, assuming they still have their Bangor stock after seven years, constitute a minute percentage of Bangor's stockholders, and they had the right to sue for the false exchange offer.* In any event, more Piper stock was tendered to Chris-Craft than to Bangor on the competing exchange offers (A 18). Petitioners show no similar solicitude for the innocent Piper stockholders who tendered to Chris-Craft. Acceptance of petitioners' specious argument would give control contestants a field day. By simply offering stock in exchange for the shares of a target company, a tenderor would be insulated from liability, no matter how outrageous its tactics in the control contest.

4. *Alleged Distinction Between Damages and Injunction*: Petitioners acknowledge that a tenderor has standing to seek a preliminary injunction under Section 14(e), but not to seek damages. Br. for Bangor at 46-47; Br. for First Boston at 24; Br. for Piper at 38. There is no basis for that distinction in logic or in Section 14(e)'s legislative history. The identical argument was rejected in *Borak*, where this Court, in upholding standing for damages, declared: "Nor do we find merit in the contention that such remedies are limited to prospective relief." 377 U.S. at 434. This Court could not have been more firm in its mandate that "it is the duty of the courts to be alert to provide such remedies as are necessary to make effective the con-

* Petitioners repeatedly hail the fact that no former Piper shareholder accepted Bangor's 1976 rescission offer. But the market price of Piper shares on the Philadelphia-Baltimore-Washington exchange had declined so much in the past seven years that rescission was a wholly illusory remedy.

gressional purpose." *Id.* at 433. *See also H. K. Porter Co.* v. *Nicholson File Co.*, 482 F.2d 421 (1st Cir. 1973), where the identical argument was made and rejected.

The argument that only injunctive relief is available is especially perverse here. When Chris-Craft originally sought a preliminary injunction, petitioners claimed that Chris-Craft had an adequate remedy in money damages.* After the preliminary injunction was denied, petitioners then claimed that money damages were also unavailable.

Bangor's exercise of control over Piper during the protracted litigation—its change of basic corporate policy and management—made equitable relief unfeasible (A 68). A court whose equitable jurisdiction has been properly invoked may, if prospective relief is impractical, award damages.** This principle, recognized in *Borak*, was more recently applied in *Mills*, where this Court directed that damages be awarded if a merger could not be unwound. 396 U.S. at 388-89. Petitioners' artificial distinction between prospective and retrospective relief is an attempt to create a loophole to avoid any relief.†

* Br. for Bangor at 40 (Sept. 18, 1969); Br. for Piper at 15 (Sept. 18, 1969).

** *See McDonald* v. *Oliver*, 525 F.2d 1217, 1226-27 (5th Cir. 1976); *Crane Co.* v. *American Standard, Inc.*, 490 F.2d 332, 341-42 (2d Cir. 1973); *Electronic Specialty Co.* v. *International Controls Corp.*, 409 F.2d 937, 946-48 (2d Cir. 1969).

† The cases cited by petitioners for the alleged distinction between equitable relief and damages are inapposite. Their main precedent, *Hawaii* v. *Standard Oil Co.*, 405 U.S. 251, 260-61 (1972), turns on the fact that Section 4 of the Clayton Act limits treble damage actions to persons injured in their "business or property," whereas Section 16 gives "any person" standing to sue for an injunction. Congress made no such distinction in the securities statutes. The securities cases cited by Bangor, Br. for Bangor at 47 n., indicate that certain elements of proof may be relaxed when a plaintiff seeks prophylactic relief rather than damages and do not hold that standing depends on the relief sought.

Policy Considerations

Because of the overwhelming legislative, judicial and administrative history of the Williams Act, petitioners finally fall back on so-called policy considerations against standing. Basically, they speculate that private actions by insurgents will discourage tender offers which are beneficial to stockholders. The market has already refuted this claim. There have been a record number of tender offers since *Chris-Craft.** The goal of encouraging tenders for the benefit of shareholders would surely be frustrated if contestants lacked standing. No honest and prudent businessman would enter such a multi-million dollar venture, as Chris-Craft did here, if he thought that his adversaries could win by illicit tactics and escape liability under the guise of standing.

All of the policy considerations, discussed at the hearings on Section 14(e), compel standing. A major theme, as noted above, was to place the tender offeror and management on an equal footing—a particularly important policy, since management starts with great advantages and often with self-serving motives. Bangor and First Boston recognize that management has standing under Section 14(e). Br. for Bangor at 46; Br. for First Boston at 24. Denying standing to a rival would obviously "tip the balance," contrary to Congress' intent.

A contestant for control who seeks shareholders' votes by a proxy solicitation can sue management for unfair

* *Merger Summary,* published semi-annually and annually by W. T. Grimm & Co., financial consultants, Chicago, Ill.

practices. But, under petitioners' theory, one who buys the shareholders' stock would be powerless. Congress not only equated tender and proxy contests, but made certain not to discourage tenders for stock.

Moreover, acceptance of petitioners' one-sided view of standing would transform control contests into jungle warfare, because there would be no effective way to stop a management that was bent on using foul tactics. The SEC does not have the manpower to police such contests, as recognized in *Borak* and by the SEC in this case.* This case proves the point that action by the SEC is often too little and too late. For here, an SEC injunction against Bangor went unheeded, and the rescission offer it obtained took place six years after the event at a time when the market made it illusory.

To restrict private enforcement to shareholder class actions, as petitioners suggest, is even more undesirable. As this Court noted in *Blue Chip,* actions on behalf of small shareholders with virtually no interest in an enterprise offer dangerous opportunities of strike suits. Senator Williams also expressed pessimism about the effectiveness of

* The Solicitor General and the SEC—who best know the limits of the agency's resources—made precisely this point in their Brief as *Amicus Curiae* Opposing Certiorari at 15:

> "This prohibition against unfair opposition is best policed by tender offerors themselves, through private lawsuits. The individual shareholders who succumb to the fraud, either by rejecting the tender offer or by accepting that of a competitor, may not have sufficient resources or adequate incentive to contest the fraud. The target corporation and its management may, as here, be among the guilty parties. The Securities and Exchange Commission has limited resources and may not be able to monitor every corporate takeover bid."

actions by small stockholders as an enforcement tool.* The parties best suited to enforce Section 14(e) are the contestants who have vital economic stakes in the outcome.**

Enabling the principal contestants to police their own contests makes particularly apt today the observation of Roscoe Pound:

> "From the beginning, the main reliance of our common law system has been individual initiative. The main security for peace at common law is private prosecution of offenders . . . [T]he individual is supposed at common law to be able to look out for himself and to need no administrative protection." Roscoe Pound, *The Causes of Popular Dissatisfaction with the Administration of Justice,* 8 Baylor L. Rev. 1, 13 (1956).

Conclusion

The evidence of congressional intent, the language of the statute, the policy considerations and the consistent interpretations by the courts, the SEC and commentators all support the Second Circuit's conclusion that Chris-Craft has standing.

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* 113 Cong. Rec. 855 (Jan. 18, 1967); 111 Cong. Rec. 28,258 (Oct. 22, 1965).

** The First Circuit has noted,

> "[A]fforading for the offeror and the target's management a cause of action for damages would in many instances further [14(e)'s] purpose [of protection of the investor]. With an obvious economic stake in the outcome of the tender offer battle, they have the incentive to detect violators and vigorously pursue remedies." *H. K. Porter Co.* v. *Nicholson File Co.,* 482 F.2d 421, 424 (1st Cir. 1973). *See also GAF Corp.* v. *Milstein,* 453 F.2d 709, 719 (2d Cir. 1971), *cert. denied,* 406 U.S. 910 (1972).

III

DEFENDANTS ACTED WITH SCIENTER.

Despite their unrelenting violations, petitioners now claim that they acted without evil intent and therefore lacked scienter as defined in *Ernst & Ernst* v. *Hochfelder,* 96 S. Ct. 1375 (1976). That argument distorts *Hochfelder* and ignores the facts of this case. Petitioners were not found liable for neglecting to look at somebody's desk for unopened mail as in *Hochfelder.* Here, they opened the mail, read it, and quietly put it back in the drawer. Petitioners violated the law with actual knowledge of the incriminating facts—they *knew* that the solicited cash purchases were illegal and they *knew* material facts about BAR and Grumman which they hid. The undisputed facts, in contrast to petitioners' subjective characterizations, show scienter from start to finish:

January 27—Piper insiders tell public that Chris-Craft's $65 cash offer is "inadequate," although First Boston had just advised the opposite.

January 29—Insiders publish fraudulent Grumman releases, while First Boston, with awareness of the actual transaction, "remains silent."

April 7—Insiders provoke delisting proceedings by the U.S. Concrete-SouthPly fiasco, in which First Boston acted as Piper's advisor.

April 20—Bangor, at a meeting with First Boston and the Piper insiders, is urged to solicit Cornfeld's key block.

May 8—Petitioners issue $80 "gun-jumping" press release, reviewed by First Boston, resulting in consent injunction in first SEC action—an injunction soon to be violated.

May 14-18—Bangor pays $9 million cash for the critical 7½% blocks from Cornfeld, *et al.*, in defiance of the recent SEC published warning and its own counsel's advice.

June 4-July 25—Insiders implore the public to accept the Bangor rather than the Chris-Craft offer without disclosing $13 million bonus.

July 18—Bangor acquires another critical 7% of Piper by false exchange prospectus concealing $13 million BAR loss. First Boston, as dealer-manager and public appraiser, endorses Bangor package, although it knows of the four-fold BAR inflation from the corporate minutes. Again, it elects to "remain silent."

September 5—Bangor seizes control of Piper. On the second business day thereafter, September 9, it authorizes sale of BAR for $5 million to Dumaine.

Petitioners did not act impulsively in an overnight control contest. This was a nine-month struggle. Moreover, early in the race, there were warning signals, including an SEC action against Bangor and the Pipers, NYSE delisting proceedings, and warnings by the SEC staff. That should have made these sophisticated businessmen particularly sensitive. Instead, they kept on defying the law.

Based on the undisputed facts, the Second Circuit held that petitioners had acted with scienter. The court

stated that "specific intent to defraud was not indispensable" but emphatically rejected the negligence standard that petitioners contend was applied (A 54, n.24). The court declared that "knowledge of falsity or reckless disregard for the truth" was required (A 35).

The Second Circuit found that this standard had been fully satisfied. Judge Gurfein characterized petitioners' conduct as "'recklessness that is equivalent to willful fraud,'" quoting Judge Friendly's scienter definition in *Texas Gulf Sulphur** (A 96). Judge Mansfield, citing that opinion and Judge Adams' opinion in *Kohn*,** said that petitioners knew the facts and refused to heed "red flags" and "warning signals" (A 106). Judge Timbers considered petitioners' misconduct to be even more outrageous (A 84). And petitioners' scienter claims were dismissed as "frivolous" in *CC III* (Oakes, Mansfield and Timbers, JJ.) (B 40, n.30).

Despite the incriminating facts and the Second Circuit's unequivocal conclusions, petitioners contend that Section 14(e) requires more—proof that a person who commits a knowing violation of the securities laws had a mental state dominated by a specific intent to defraud the injured party. This is a standard which no court has ever required in a criminal or civil securities case—a standard which would make the right to a private remedy illusory. It would permit wrongdoers with actual knowledge of the truth to

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* *SEC* v. *Texas Gulf Sulphur Co.*, 401 F.2d 833, 868 (2d Cir. 1968), *cert. denied*, 394 U.S. 976 (1969).

** *Kohn* v. *American Metal Climax, Inc.*, 458 F.2d 255 (3d Cir.) (Adams, J., concurring and dissenting), *cert. denied*, 409 U.S. 874 (1972).

escape on the basis of the very type of self-serving statements of mental attitudes that the Court criticized in *Blue Chip* as the basis for an action by an innocent party. 422 U.S. at 743-46.

Hochfelder and Its Antecedents

For their argument that specific intent to defraud is required, petitioners rely on *Hochfelder*. There, this Court rejected negligence as equivalent to scienter for liability in a Rule 10b-5 case. The Court held that the anti-fraud language of Section 10(b) required "knowing or intentional misconduct." 96 S. Ct. at 1383. Under the language of Section 10(b), which "speaks so specifically in terms of manipulation and deception," 96 S. Ct. at 1391, and for the purpose of that case, the Court defined scienter as an "intent to deceive, manipulate or defraud." 96 S. Ct. at 1381. *Hochfelder* certainly does not immunize petitioners from liability in this case.

First, neither *Hochfelder* nor the precedents it cited hold that a knowing misrepresentation of an important fact (such as the BAR and Grumman misstatements) or a premeditated violation (such as the Cornfeld cash purchase) would not constitute sufficient scienter. Indeed, the word scienter means "knowingly." Black's Law Dictionary at 1512 (4th ed. 1968). And the precedents referred to in *Hochfelder* have all accepted knowledge of falsity or reckless disregard as sufficient for liability.

Thus, *Lanza* v. *Drexel & Co.*, 479 F.2d 1277, 1306, n.68 (2d Cir. 1973) (*en banc*), citing *CC II* with approval, makes clear that knowledge of falsity or deliberate disregard of the truth constitutes fraudulent intent or scienter. *Small-*

wood v. *Pearl Brewing Co.*, 489 F.2d 579, 606 (5th Cir.), *cert. denied*, 419 U.S. 873 (1974), holds that scienter would be present if "defendants made statements they either knew to be false or knew they had no basis for believing were true." Judge Adams' chart of scienter cases in *Kohn* v. *American Metal Climax, Inc.*, 458 F.2d 255, 312-16 (3d Cir.), *cert. denied*, 409 U.S. 874 (1972), shows that knowledge of falsity or indifference to truth satisfies 10b-5's scienter standard. *Clegg* v. *Conk*, 507 F.2d 1351 (10th Cir. 1974), *cert. denied*, 422 U.S. 1007 (1975), condemns the making of statements with knowledge of falsity or disinterest in their accuracy. Judge Friendly's concurring opinion in *SEC* v. *Texas Gulf Sulpher Co.*, 401 F.2d 833, 868 (2d Cir. 1968), *cert. denied*, 394 U.S. 976 (1969), states that scienter is satisfied by "recklessness that is equivalent to willful fraud," citing a case of a lawyer guilty of "closing his eyes to what he saw."* Judge Friendly's opinion in *Gerstle* v. *Gamble-Skogmo, Inc.*, 478 F.2d 1281, 1299 (2d Cir. 1973), specifically approved *CC II's* scienter ruling, in the very sentence only partially quoted by Bangor. Br. for Bangor at 67 n. Finally, Bucklo, *Scienter and Rule 10b-5*, 67 Nw. U.L. Rev. 562, 568-70 (1972), also cited in *Hochfelder*, states that if a person knows the falsity of the statements, whatever his subjective intent, the conduct is fraudulent. In short, no court ever required more than a knowing violation, and that was surely proved here.

Second, in *Hochfelder*, the Court specifically left open the question "whether, in some circumstances, reckless be-

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* *SEC* v. *Frank*, 388 F.2d 486, 489 (2d Cir. 1968). Judge Adams stated that the *Frank* case strongly suggests that "recklessness would be tantamount to willful fraud, from which intent could be inferred." *Kohn* v. *American Metal Climax, Inc.*, 458 F.2d 255, 281 (3d Cir.) (Adams, J., concurring and dissenting), *cert. denied*, 409 U.S. 874 (1972).

havior is sufficient for liability under §10(b) and Rule 10b-5." 96 S. Ct. at 1381, n.12. The precedents cited in *Hochfelder,* noted above, stated that recklessness was adequate. Indeed, reckless disregard of the truth is sufficient to meet the heavy burden of proof in criminal cases under the securities laws* and other penal statutes.** It is a standard jury charge that reckless disregard satisfies the high degree of intent necessary in criminal cases.† Reckless disregard of the truth also limits the press' rights under the First Amendment in libel suits by public figures.‡

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* *United States* v. *Natelli,* 527 F.2d 311, 322-23 (2d Cir. 1975), *cert. denied,* 44 U.S.L.W. 3592 (April 20, 1976); *United States* v. *Henderson,* 446 F.2d 960, 966 (8th Cir.), *cert. denied,* 404 U.S. 991 (1971); *United States* v. *Simon,* 425 F.2d 796, 812 (2d Cir. 1969), *cert. denied,* 397 U.S. 1006 (1970); *Elbel* v. *United States,* 364 F.2d 127, 134 (10th Cir. 1966), *cert. denied,* 385 U.S. 1014 (1967); Matthews, *Criminal Prosecutions Under the Federal Securities Laws and Related Statutes: The Nature and Development of SEC Criminal Cases,* 39 Geo. Wash. L. Rev. 901, 954 (1971).

** *See, e.g.,* mail fraud, 18 U.S.C. §1341: *United States* v. *Mackay,* 491 F.2d 616, 623 (10th Cir. 1973), *cert. denied,* 419 U.S. 1047 (1974); *Babson* v. *United States,* 330 F.2d 662, 664 (9th Cir.), *cert. denied,* 377 U.S. 993 (1964); Civil Rights Statute, 18 U.S.C. §§241, 242: *United States* v. *Guest,* 383 U.S. 745, 786 (1966) (Brennan, J., concurring); making false statements to the government, 18 U.S.C. §1001: *United States* v. *Sarantos,* 455 F.2d 877, 880 (2d Cir. 1972); *United States* v. *Abrams,* 427 F.2d 86, 91 (2d Cir.), *cert. denied,* 400 U.S. 832 (1970); other penal statutes: *United States* v. *Thomas,* 484 F.2d 909, 913 (6th Cir. 1973), *cert. denied,* 415 U.S. 924 (1974) (18 U.S.C. §922); *United States* v. *Brawer,* 482 F.2d 117, 128-29 (2d Cir. 1973), *cert. denied,* 419 U.S. 1051 (1974) (18 U.S.C. §§2, 371 & 2314).

† *See, e.g.,* 1 Dowsey, *Charges to the Jury and Requests to Charge in a Criminal Case in New York,* Form No. 100, at 6-19, 6-20 (1968).

‡ *See, e.g., Time, Inc.* v. *Firestone,* 44 U.S.L.W. 4262 (March 2, 1976); *Cantrell* v. *Forest City Publishing Co.,* 419 U.S. 245 (1974); *New York Times Co.* v. *Sullivan,* 376 U.S. 254 (1964).

If reckless disregard can send men to jail and limit a free press, it is an adequate predicate for compensatory damages to victims of securities violations.* Here, of course, there is far more than recklessness: there is actual knowledge. Such conduct is surely sufficient to satisfy the most demanding requirements of scienter.**

Finally, *Hochfelder* looked to the language and history of Section 10(b) and Rule 10b-5 in determining the appropriate standard of scienter. A similar examination of Section 14(e) shows that no requirement of a specific motive to defraud was intended or imposed by Congress.

The Language of §14(e)

Unlike Section 10(b), Section 14(e)'s prohibitions are not limited to fraudulent, manipulative and deceptive conduct. The section, phrased in the disjunctive, also directly prohibits failures to disclose.†

Indeed, Section 14(e) reverses the sequence of Rule 10b-5 and begins with a proscription of misrepresentations and omissions—not fraudulent, deceptive and manipulative conduct. The drafting history of the section, from the first draft, makes manifest Congress' intent to prohibit "mis-

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* Bangor recognizes that recklessness is sufficient but defines it in a way that would exclude all culpable conduct except that showing specific intent to defraud. Its only concession is to say that a court may make such a finding "despite a defendant's protestations of good faith." Br. for Bangor at 49-50, n. That is semantic nonsense.

** Contrary to Bangor's suggestion, recklessness is not raised here for the first time. Br. for Bangor at 61, n. The court of appeals discussed the concept extensively (A 35, 48, 54, n.24, 96, 103).

† *See, e.g.,* 112 Cong. Rec. at 19,007 [SEC Mem.] (what is now Section 14(e) "affords a more practical means of preventing inaccurate or incomplete presentations *or* fraudulent acts or practices . . .") (emphasis added).

leading statements" in addition to fraud. This is of prime significance. *Hochfelder* contrasted Section 10(b)'s language of manipulation and deception with Rule 10b-5(2)'s pro-disclosure language and suggested that the latter, standing alone, could be read as proscribing even nonintentional omissions, if such language had been incorporated in the statute. 96 S. Ct. at 1390. Here, it is in the statute.*

The Legislative History of §14(e)

The legislative history of Section 14(e) also mandates that petitioners' insistence on proof of specific intent to defraud be rejected. The SEC, urging §14(e)'s passage, stated that it would ban omissions and misstatements even though they fell short of outright fraud.** Congress

* Similarly, Judge Friendly in *Gerstle* v. *Gamble-Skogmo, Inc.*, 478 F.2d 1281, 1299 (2d Cir. 1973), and the Third Circuit in *Gould* v. *American-Hawaiian Steamship Co.*, [1975-76 Transfer Binder] CCH Fed. Sec. L. Rep. ¶95,512, at 99,597 (3d Cir. 1976), stressed the distinction between the "evil sounding language" of Section 10(b) and the milder language used in the proxy provisions.

Both the Second Circuit and the Third Circuit (which discussed *Hochfelder*) held that negligence was sufficient for liability under Section 14(a). But here, despite Congress' intent to subject tender offers to the same regulation as proxy contests, the Second Circuit rejected negligence as a standard—it found knowing violations and reckless disregard for the truth.

** Chairman Cohen stated:

> "The management may wish to put out literature opposing the bid. The literature may not be subject to easy establishment as being outright fraudulent, but it may be inadequate. It may omit material information.
>
> "In that sense, if anything, the bill would assist both sides." *Senate Hearings* at 178.

In a supplemental memorandum, the SEC again pointed out that the Williams bill would go beyond outlawing fraudulent and deceptive practices, saying:

> "The most flagrant abuses are already subject to the antifraud and antimanipulative rules the Commission has adopted pursuant

(footnote continued on next page)

adopted that principle both by the disclosure language it chose to use in Section 14(e) and by the amendment it rejected. Indeed, even under the more ominous language of the 1934 Act, a requirement of intent to injure or defraud another was rejected for criminal liability as an "impossible standard of proof," in the words of Senator Barkley.*

Thus, the language and the legislative history of Section 14(e), all the precedents and the very rationale of *Hochfelder* all compel the conclusion that specific intent to de-

> to Section 10(b) of the Securities Exchange Act of 1934. But these rules do not provide us with adequate authority to protect investors until we can establish the existence of fraud." *Senate Hearings* at 210.
>
> Moreover, Chairman Cohen asked the House to reject a proposed exemption which would have left management solicitations in opposition to a registered exchange offer subject only to the antifraud rules of Section 10(b). He stated:
>
> > "There are many situations as to which it would be difficult to mount a case of fraud but, as this committee decided back in 1934 with respect to proxy solicitations, this type of industrial warfare, if I may use that expression, should be subject to affirmative requirements which would be developed by the Commission to implement this legislation even if the activities do not rise to the level of fraud. . . ." *House Hearings* at 18.
>
> Congress accepted the reasoning by rejecting the proposed exemption.

* 78 Cong. Rec. 8297 (May 8, 1934). In arguing against a proposed amendment which would require proof of specific intent to defraud, Senator Barkley stated: "To adopt the amendment would make it almost impossible to prove, although a man violates the law, that he intended any injury against any particular person." He added, "It would be easy for any defendant . . . to come in and say, 'I did willfully violate this law . . . but I did not intend to injure anybody.' Under such circumstances, how could the Government prove that what he was saying was not the truth?" *Id.*

To the same effect, Thomas G. Corcoran, a draftsman of the 1934 Act, stated that in civil actions the statute would not be "worth a hoot if a plaintiff should have to prove that the defendant intentionally deceived him." *Hearings on H.R. 7852 Before the House Comm. on Interstate and Foreign Commerce*, 73d Cong., 2d Sess. 113 (1934).

ceive is not required. The conduct here establishes scienter under the most demanding requirements of proof that courts could reasonably impose.

Petitioners' Specious Arguments

1. *Petitioners' "Good Faith"*: Despite the legislative history of the Williams Act and the other considerations mentioned above, petitioners assert that they are not liable because the district court concluded that they acted without specific intent to defraud Chris-Craft or without other evil intent. But petitioners' argument and the district court's legal characterizations were rejected by the Second Circuit, for they were based on the district court's erroneous views as to the policy underlying Section 14(e), and conflicted with the district court's own findings and the undisputed facts.

A fair reading of its opinion shows that the district court did not subscribe to Senator Williams' belief that if rivals for control were free to engage in improper tactics, their contests would inevitably degenerate into "industrial warfare" in which the public interest would be sacrificed. *See supra* at 49, n.**, 70-71, n.**. As noted above, a concept of full disclosure and fair play going far beyond outright fraud, was at the very heart of the new statute.

The district court took no note of the legislative history of Section 14(e) and, on the contrary, decided the case under its conception of Section 10(b) standards (A 134). It suggested that sophisticated participants are entitled to little protection under the securities laws and that, in effect, they assume the risk of sharp practices by their rivals, short

of common law fraud (A 127). The court stressed that it had "made it clear that it would not, at the behest of a disappointed contender in a battle for corporate control, necessarily take the same view of the requirements of the securities laws and rules as it does in cases of claimed injury to the average public investor" (D 31). The district court's characterizations of the petitioners' motives was therefore a reflection of its premises that participants in control contests should fend for themselves—a view that Bangor still urges in this Court. Br. for Bangor at 21.*

The Second Circuit, in keeping with the intent of the Williams Act, rejected the district court's permissive attitude toward control contests.** It stressed that the district court had applied erroneous legal standards (A 37). Noting that the facts in this case "are substantially undisputed" (A 7, n.1), it concluded that these facts and the district court's own findings established a clear case of scienter.

As to Bangor: Bangor stipulated that two of its three illegal cash purchases were from broker-dealers and the

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* In view of Bangor's emphasis on scienter, it is significant to note that the district court erroneously ruled (App. 46-1) that Chris-Craft was not entitled to ask Bangor's Chairman Salgo the purposes for which Bangor had engaged Nathan Voloshen, a Washington influence peddler—a point bearing on Bangor's consciousness of guilt. Voloshen had invoked the Fifth Amendment at a pre-trial deposition when asked about his engagement by Bangor. The episode underlines the incongruity of the district court's decision which imposed on Chris-Craft the burden of proving specific intent to defraud, but barred discovery of possible evidence pertaining to state of mind.

** The district court's rejection of the philosophy underlying the Williams Act is also reflected in its opinion in *GAF Corp.* v. *Milstein*, 324 F. Supp. 1062 (S.D.N.Y.) (Pollack, J.), *rev'd*, 453 F.2d 709 (2d Cir. 1971), *cert. denied*, 406 U.S. 910 (1972)—an opinion under Section 13(d) which runs contrary to this Court's rationale in *Rondeau*.

district court flatly rejected Bangor's claim that the third purchase from Cornfeld was not solicited (A 149). It is also undisputed that all of the cash purchases were made in defiance of the warnings published by the SEC and the advice of Bangor's counsel. Nevertheless, the district court speculated that Bangor's "motivation" was to "adhere to" Rule 10b-6. Nobody claims such "motivation" in this Court.

The district court also found that Bangor knew that BAR's represented "fair market value" was inflated, and rejected Bangor's accounting defense (D 14-16, 19). Indeed, Bangor now makes a startling admission of subjective scienter: "BPC has, of course, never contended that in 1969 its directors believed the market value of the BAR to be $18.4 million." Br. for Bangor at 58. Unfortunately, nobody told the public for whose stock Chris-Craft and Bangor were bidding. In light of these facts, the Second Circuit flatly rejected the district court's benign legal characterization of Bangor's behavior as "unintentionally in error" or "negligent." The court found overwhelming evidence of scienter, meeting the standard of "knowledge of falsity or reckless disregard for the truth" (A 35). Bangor was described as making representations of value known to be "deceptive and unrealistic" (A 48), as having committed acts tantamount to "willful fraud" (A 96) (Gurfein, J.) and as ignoring "red flags" of warning (A 106) (Mansfield, J.). No other conclusion is compatible with the facts.

As to First Boston: The district court concluded that First Boston's officers "acted solely in furtherance of what

they believed in good faith to be in the legitimate interests of their clients" (A 159). Indeed, First Boston's attitude could be summed up by the statement in its pretrial brief that it had a "kind of professional privilege" to remain silent. *See supra* at 8. The Second Circuit disagreed with the conclusion that loyalty to clients excuses silence in the face of misrepresentations. It concluded that First Boston, after reading Bangor's minutes, knew enough to deduce that BAR was grossly overvalued, and that First Boston's endorsement and circularization of the false prospectus was "an almost complete abdication" of its responsibilities under Section 14(e) (A 55). No other conclusion is possible in view of First Boston's admitted knowledge of the truth and its decision "to remain silent."

As to the Pipers: The district court found that the "put" in the Grumman contract was a "rational step," not "a sham" (A 136). But, as the Second Circuit noted, the press release about Grumman was a sham because it concealed the put and "portrayed the Grumman agreement as a completely favorable deal" (A 39-40). The Second Circuit thus concluded that the Piper insiders sent the shareholders letters opposing Chris-Craft's offer "knowing that they were materially misleading" (A 38). The Piper insiders' vow to burn the plant before allowing Chris-Craft to acquire control (App. 1890) is telling evidence of their scienter—which the insiders do not seriously contest.

In sum, the undisputed facts and the Second Circuit's analysis of the record and the policy underlying Section 14(e) all support its finding that, at a minimum, petitioners were guilty of reckless disregard of the truth. Whatever

petitioners' motivations, their conduct could only have been intended to injure Chris-Craft, whose tender offers they were opposing. Petitioners' *post hoc* subjective rationalizations and legal labels cannot obscure the Second Circuit's unanimous scienter conclusions in *CC II* and *CC III*. Acceptance of petitioners' arguments would make Section 14(e) a dead letter.

2. The Scienter Round-Robin:

Bangor: It claims that it lacked scienter as to the illicit $9 million cash purchases, arguing a lack of knowledge of any contrary rule and reliance on counsel. Br. for Bangor at 51-54.* That is false. *See supra* at 13-14, 32. Bangor also claims that it lacked scienter with respect to BAR's inflated value, arguing that it relied on First Boston, counsel and accountants. Br. for Bangor at 57. But all the courts below found that Bangor's top management *knew* that BAR was over-valued and that this could not be justified on any so-called accounting principle (D 13, 14; A 48).**

* Bangor previously conceded that scienter was not required for its 10b-6 violation. Pet. for Bangor for Certiorari at 11, n. (1973).

** Petitioners' record citations refute its claims of reliance on accountants. To the extent there was any evidence of discussion with accountants, it was highly incriminating as to the $18.4 million "fair market value" of BAR. Bangor, which did not call its auditors to testify, stipulated that they advised that the sale of BAR's stock would create an extraordinary loss of $13.5 million (D 6). Unwilling to show that loss, Bangor next asked about the tax consequence of an asset sale and was told that this would require long study (D 8, n.6; App. 1759-61). After hearing this advice, Bangor chose to defer formal approval of a sale and to continue to carry BAR at a fair market value which the district court found could not be justified by any principle of accounting (D 14). The district court held that the BAR disclosure was management's, not the accountants', responsibility (D 19).

In an effort to gloss over the BAR misrepresentation, Bangor refers to the $18.4 million figure by every term except what it was—a "market price evaluation."* Accounting rules permitting assets to be carried at historic cost do not justify a representation that a railroad has a market value almost four time its actual worth. The district court and the Second Circuit so found.

First Boston: It claims a lack of scienter as to BAR on the theory that it relied on Bangor and counsel. Br. for First Boston at 16, 38-40. But First Boston itself knew from Bangor's minutes that BAR's value was exaggerated (A 51-55). No court found that First Boston relied on counsel. Indeed, First Boston argued below that it had a privilege akin to a lawyer's "to remain silent."

First Boston's claim that it relied on Bangor is the mirror image of Bangor's claim that it relied on First Boston. Br. for First Boston at 40. Furthermore, as the Second Circuit stressed, First Boston had an obligation "to reach a careful independent judgment based on facts known to it" (A 51). That was especially important here because First Boston promised the public that it would check the value of Bangor's offer based on various factors including Bangor's assets. *See supra* at 21.**

* EV 99. Avoiding the use of this term, Bangor calls this figure "carrying or book value" and "appraisal figure" and "carrying value." Br. for Bangor at 54, 58.

** *Kohn* v. *American Metal Climax, Inc.*, 458 F.2d 255, 268 (3d Cir.), *cert. denied*, 409 U.S. 874 (1972), imposed 10b-5 liability because investment bankers had not given sufficient emphasis in proxy material to the *disclosed* facts that their endorsement of an amalgamation plan "was not based on an independent survey of assets and operation" but "relied solely on data supplied by . . . management." Here, First Boston did not even disclose that it allegedly relied solely on Bangor's appraisal—or, far worse, that it knew that the appraisal was almost four times greater than true value.

Finally, First Boston argues that a further investigation would not have disclosed information as to the timing of BAR's sale. That misses the point: First Boston knew that BAR was worth $5 million, not $18.4 million, whether or not a sale was imminent.*

Piper Insiders: To complete the circle, they claim that they relied on First Boston. Br. for Piper at 6, 7. In turn, First Boston has contended that it was just a hired hand who took its orders from the Pipers (A 55, n.25). But the insiders, and their advisor, both *knew* that Grumman had an option, not a commitment, to invest $20 million in Piper. Since Piper's president admitted that the Grumman affair was designed to injure Chris-Craft, scienter was conceded. The insiders also imply a lack of scienter because they allegedly reached a bona fide decision to oppose Chris-Craft for the benefit of shareholders. Br. for Piper at 45. But whatever the insiders' self-justification for the "scorched earth" policy, they were not free to lie to achieve their objectives.

In summary, petitioners' argument that, despite actual knowledge of the damning facts, they lacked subjective malice in their nine month campaign against Chris-Craft, is a game of semantic gymnastics in an "area where glib generalizations and unthinking abstractions are major occupational hazards." *SEC* v. *National Securities, Inc.*, 393 U.S. 453, 465 (1969). The undisputed facts, rather than legal labels or psychological standards, spell out scienter under any objective standard.

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* First Boston also claims that if it had spoken to Dumaine it would not have learned that a sale was likely. Br. for First Boston at 39, n.20. That, of course, is not what Dumaine and Hutchins thought (D 11, n.9).

IV

PETITIONERS' VIOLATIONS CAUSED INJURY TO CHRIS-CRAFT.

There is no merit to petitioners' claims that the Second Circuit used erroneous principles of causation. Here, the existence of causation was a matter of mathematics and went far beyond the showing required by standards established in *Mills*, *Ute* and *TSC*.

Thus, as the Second Circuit repeatedly stressed, Bangor's control depended on its illegally-acquired shares (A 60, 67, 96, 110). The causation arithmetic in this extremely close race was as follows:

1. Bangor acquired 7½% of Piper's stock for cash in violation of Rule 10b-6.
2. Bangor obtained an additional 7% of Piper's stock by its materially misleading exchange offer.
3. Without either illegal block, Bangor would lack its 50% majority.
4. Without both blocks, Chris-Craft would have led by at least 41% to 31% at the end of the competing exchange offers in August and could not have been overtaken, according to the experts. Petitioners' expert conceded that such a lead would have been "formidable" (App. 2876); respondent's expert termed it a 99-to-1 certainty (EV 831). And the Second Circuit in *CC III* noted that Chris-Craft's plurality lead would normally have commanded a

premium for the opportunity to obtain control (B 25).

5. In fact, Chris-Craft would have had an even larger lead because the petitioners dissuaded Piper's public shareholders from tendering more shares to Chris-Craft at the beginning of the contest and on the exchange offer (A 65).

Petitioners cannot overcome these figures. This is a textbook case in which the illegal acquisitions actually reversed the outcome of a close contest and gave Bangor control of Piper. Causation could not be clearer.

The 7½% Obtained by Illegal Cash Transactions

There is no serious denial that Bangor's illegal acquisition of the key 7½% blocks from Cornfeld and others tipped the balance against Chris-Craft. Indeed, in the middle of the control contest, Bangor boasted that this sealed Chris-Craft's fate.*

The facts here are overwhelming. Petitioners believed that the pivotal blocks were leaning to Chris-Craft. *See supra* at 12. The SEC publicly announced that their purchases would be unlawful. Chris-Craft obeyed. Bangor did not. Cause and effect, as the Second Circuit pointed out, were obvious. Judge Timbers declared, "Even arithmetically, it is apparent that the block purchases in violation of Rule 10b-6 were essential to achieve control" (A 67). Judge Gurfein stated, "since the block purchases were necessary for control causation was established" (A 96). And

* Complaint in *Bangor Punta Corp.* v. *Chris-Craft Indus., Inc.*, 69 Civ. 2354 (S.D.N.Y. June 2, 1969) ¶11 D, *quoted supra* at 15.

Judge Mansfield concurred that "BPC's unlawful purchases of Piper shares enabled it to gain control of Piper . . . ." (A 111)

But petitioners speculate that if Bangor had not acquired the shares illegally in May, it might have been able to buy them legally at some other time, for example, in August, after the exchange offers ended. Br. for First Boston at 45. And Bangor adds that Chris-Craft "would, of course, have suffered exactly the same 'injury' if BPC's purchases" had been made ten days earlier or two months later, when they would have been lawful. Br. for Bangor at 34. But

> "[d]efendants cannot accomplish by deception what they might have accomplished honestly and then be heard to say that the deception was not the cause. Lawsuits are determined by what was and not what might have been." *Eagle* v. *Horvath*, 241 F. Supp. 341, 344 (S.D.N.Y. 1965).*

Moreover, if Chris-Craft had led 41% to 31% in mid-August (the situation that would have existed but for Bangor's illegal 14½% blocks), it is unlikely that Bangor would have risked $9 million for these blocks, if they were available. Bangor had a policy against spending cash unless it was sure of victory (EV 300). Trailing 41% to 31%, it would have been a sure loser (App. 2430-31, 2629-30, 2722, 2876, 3020).

* This proposition is an application of the principles established in *Bigelow* v. *RKO Radio Pictures, Inc.*, 327 U.S. 251 (1946). *See infra* at 89-90.

The 7% Obtained by the False Exchange Offer

Causation was also established beyond dispute in connection with Bangor's misleading exchange offer by which it obtained 7% of Piper's shares—another block critical to its 50% position. The offer concealed BAR's $13 million loss, which would have wiped out 36% of Bangor's retained earnings and 12% of its equity (A 46; D 15), and converted Bangor's per share earnings from more than $3 to a loss of almost $1.30 (D 15). These would have been material facts under any circumstances. They were especially material here because Piper stockholders were faced with competing exchange offers which they found equally attractive: they tendered 112,000 shares to Chris-Craft and 111,600 to Bangor in the competing exchange offers (A 18). Disclosure of the huge BAR loss, with its devastating effect on earnings and net worth, surely would have had a dramatic impact.

On this point, the Second Circuit was again unanimous. Judge Timbers stated, "Since BPC eventually acquired only about 51% of the outstanding Piper shares, it is clear that the 7% acquired through its exchange offer was critical to its success" (A 60). Judge Gurfein stated that "the seven per cent illegally acquired by BPC caused it to win" (A 95). Judge Mansfield agreed (A 110).

Those conclusions are clearly correct. Here, the lower courts found that the BAR misrepresentation was material (A 45; D 15-16), and that it was an "essential link" to Bangor's obtaining control (A 60, 95, 110). Under those circumstances, causation is established as a matter of law, under the Court's opinions in *Mills, Ute* and *TSC*.

Thus, in *Mills,* shareholders complained about a proxy statement that was defective because it failed to disclose certain facts with sufficient emphasis. This Court stated:

> "Where the misstatement or omission in a proxy statement has been shown to be 'material' . . . that determination itself indubitably embodies a conclusion that the defect was of such a character that it might have been considered important by a reasonable shareholder who was in the process of deciding how to vote. This requirement [is] that the defect have a significant *propensity* to affect the voting process . . . .
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> "There is no need to supplement this requirement, as did the Court of Appeals, with a requirement of proof of whether the defect actually had a decisive effect on the voting. Where there has been a finding of materiality, a shareholder has made a sufficient showing of causal relationship between the violation and the injury for which he seeks redress if . . . he proves that the proxy solicitation itself, rather than the particular defect in the solicitation materials, was an essential link in the accomplishment of the transaction. This objective test will avoid the impracticalities of determining how many votes were affected, and, by resolving doubts in favor of those the statute is designed to protect, will effectuate the congressional policy of ensuring that the shareholders are able to make an informed choice when they are consulted on corporate transactions." 396 U.S. at 384-85 (footnote omitted; emphasis in original).

In *Ute,* where defendants failed to make complete disclosure to members of a class who sold stock, this Court declared:

> "Under the circumstances of this case, involving primarily a failure to disclose, positive proof of re-

liance is not a prerequisite to recovery. All that is necessary is that the facts withheld be material in the sense that a reasonable investor might have considered them important in the making of this decision. . . . This obligation to disclose and this withholding of a material fact establish the requisite element of causation in fact. *Chasins* v. *Smith, Barney and Co.*, 438 F.2d at 1172." 406 U.S. at 153-54.

Mills and *Ute* were recently reaffirmed by this Court in *TSC*. There, the Court summarized those decisions: "So long as the misstatement or omission was material, the causal relation between violation and injury is sufficiently established . . . if 'the proxy solicitation itself . . . was an essential link in the accomplishment of the transaction.'" 96 S. Ct. at 2130-31, *quoting Mills*. And the Court stressed that the materiality standard

> "does not require proof of a substantial likelihood that disclosure of the omitted fact would have caused the reasonable investor to change his vote. What the standard does contemplate is a showing of a substantial likelihood that, under all the circumstances, the omitted fact would have assumed actual significance in the deliberations of the reasonable shareholder." 96 S. Ct. at 2133.

Here, the courts found that the misrepresentations would have been significant to Piper shareholders in their consideration of Bangor's exchange offer (A 45-46; D 15-16). The unlawfully acquired shares were an "essential link" necessary to give Bangor 50% control. And unlike *Mills*, the contest here was a close one.

The petitioners attempt to distinguish *Mills* and *Ute* on the ground that Piper's stockholders, rather than

Chris-Craft, relied on the false BAR valuation. But this is a distinction without substance. As the Second Circuit held in *Crane Co.* v. *Westinghouse Air Brake Co.*, 419 F.2d 787 (2d Cir. 1969), *cert. denied*, 400 U.S. 822 (1970):

> "When Crane entered the securities market with its tender offer, it was entitled to the Act's protection not only against being deceived itself but also against deception of the investing public designed to prevent the public from entering into securities transactions." 419 F.2d at 796.

And this Court declared in *Borak*, 377 U.S. at 432, "The damage suffered results not from the deceit practiced on [the shareholder] alone but rather from the deceit practiced on the stockholders as a group."* Indeed, in *Mills* itself, other shareholders, not the plaintiff, were misled. This principle applies with added force to tender contests. For Section 14(e) was especially drawn to bar misleading statements in opposition to tenders—statements typically made to target shareholders to discourage them from accepting a rival's offer.**

The application of the *Mills-TSC* standard is particularly appropriate here. As Justice Harlan noted in *Mills*:

> "Proof of actual reliance by thousands of individuals would, as the court [below] acknowledged, not be

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* *See also Herbst* v. *International Tel. & Tel. Co.*, 495 F.2d 1308, 1315-16 (2d Cir. 1974) (Lumbard, J., following *CC II*); *Kohn* v. *American Metal Climax, Inc.*, 458 F.2d 255 (3d Cir.), *cert. denied*, 409 U.S. 874 (1972); *Vine* v. *Beneficial Finance Co.*, 374 F.2d 627, 635 (2d Cir. 1967); *Union Pacific R.R.* v. *Chicago & North Western Ry.*, 226 F. Supp. 400 (N.D. Ill. 1964).

** Petitioners argue that *Mills* and *Ute* are inapposite because those cases were decided under Sections 14(a) and 10(b). That argument defies Congress' intent to equate tender offer and proxy regulation. *See supra* at 41-42.

feasible, see R. Jennings & H. Marsh, Securities Regulation, Cases and Materials 1001 (2d ed. 1968); and reliance on the *nondisclosure* of a fact is a particularly difficult matter to define or prove, see 3 L. Loss, Securities Regulation 1766 (2d ed. 1961)." 396 U.S. at 382, n.5 (emphasis in original).*

The Second Circuit made the same point here:

> "The fact that CCI was not directly deceived is what makes application of the *Mills-Ute* test appropriate and essential. It would be unduly burdensome to require an offeror to prove actual reliance when, as here, there are numerous shareholders who undoubtedly possess a wide range of expertise and knowledge. It would be impractical to require CCI to prove that each individual Piper shareholder who failed to trade for CCI's stock, or who traded for BPC's stock, relied upon defendants' misrepresentations in doing so." (A 59)

Finally, Bangor claims that it never had an opportunity to rebut causation under the *Mills-Ute* standard. This is false. Chris-Craft relied on *Mills* and *Crane* from the outset of the liability trial (*Ute* was decided later). Bangor attempted to prove through expert testimony that reasonable stockholders would not have been affected by a loss on BAR. But both courts below found that the disclosure would have been highly material (A 45; D 15-16).

Petitioners' Speculations

Petitioners advance a series of speculative factual arguments, which boil down to a claim that perhaps they would have won even if they had not violated the law; and that

* Bangor's argument that Chris-Craft could have called large institutional shareholders to testify is disingenuous. Br. for Bangor at 74, n. Bangor preempted the key large blocks by its unlawful cash purchases in May.

Chris-Craft must, and cannot, show with definite certainty that it would have won if the race were not rigged. Acceptance of that view would make it impossible for victims ever to prove causation in control races: the more egregious the wrong, the more impossible the proof. In *Bigelow*, this Court flatly rejected such cynical arguments.

(1) Thus, Bangor claims that "there is no good reason to think that any Piper shareholders were influenced by the BAR omission at all." Br. for Bangor at 74, n.**. That flies in the face of the specific findings below that the omission would have been regarded as material by a reasonable Piper shareholder. *See supra* at 35.

(2) Petitioners conjecture that if the facts about BAR had been disclosed and had caused Bangor's exchange offer to fail, Bangor might have acquired the tendered shares later for cash. Br. for First Boston at 22, 44; Br. for Bangor at 77-78. But a party who wins illegally cannot later speculate that he might have won anyway. And this argument ignores the fact that Chris-Craft had a simultaneous competing exchange offer and might have attracted many of the shares tendered to Bangor if the bad news about BAR had been disclosed. To carry the speculation one step further, if the 111,600 shares Bangor acquired had not been tendered to either side and if Chris-Craft led 41%-31% at the end of the exchange offers in an honest race, Bangor clearly would not have paid cash for those shares in view of its hopeless position and its policy against spending cash unless control were assured (EV 300).

(3) Petitioners speculate that Bangor might have acquired the illicit 7½% cash blocks lawfully some other way

on some other day. But the fact is that they did not; and, indeed, one can infer that Bangor had some reason to believe that it could not have done so, because it bought the blocks while its exchange offer was pending—not earlier or later—in defiance of its own counsel's warnings.

(4) Petitioners also claim that Bangor won because its offers were higher, and Chris-Craft had run out of funds. Those claims are based on distortions of the record and the opinions below.* Again, if Bangor's offers were better, and if Chris-Craft had run out of cash, Bangor would not have found it necessary to violate the law so often.

(5) The Piper insiders claim that their fraudulent January statements could not have injured Chris-Craft because the contest was not definitely decided until several months later. Br. for Piper at 34. But those misleading

* Bangor did not spend more cash than Chris-Craft. It spent about $17 million in cash; Chris-Craft spent more than $38 million in cash (A 18; App. 478-79, 488). Significantly, Bangor spent cash only twice: for the illegal 7½% purchases in May and for the 5% market purchases in August which sewed up its illegally-gained victory. Bangor's additional claim that its exchange package was worth more than Chris-Craft's competing offer is belied by the fact that Chris-Craft's offer attracted more Piper shares.

In claiming that Chris-Craft had run out of cash, petitioners refer to remarks by Judge Mansfield in his partial dissent in *CC II* as to the Pipers—remarks dealing with the period in January immediately after Chris-Craft's $65 cash tender (A 112-16). But the majority in *CC II* found that Chris-Craft *had* available cash resources in January (A 61-63). And, moreover, at the subsequent damage trial in *CC III*, Chris-Craft demonstrated through its financials that it had over $10 million in cash on hand for Piper purchases from April through August; and Chris-Craft's banker testified that funds definitely would have been made available in August if Chris-Craft led 41% to 31% in a lawful race (App. 3085-87, 3105). That testimony was undisputed. The bank obviously would not have allowed Chris-Craft to end up in a locked-in minority position when majority control was within its grasp.

statements, as the Second Circuit stressed, discouraged Piper shareholders from tendering more stock to Chris-Craft in January and also had a continuing adverse impact on Chris-Craft's later offer to Piper shareholders (A 62-63).*

Petitioners' speculative arguments offend principles recognized in *Bigelow* v. *RKO Radio Pictures, Inc.*, 327 U.S. 251 (1946). There, as here, defendants argued that plaintiff could not recover unless it established that it definitely would have been better off under conditions that might have prevailed in a free marketplace not affected by defendants' antitrust violations. In rejecting that contention, this Court declared:

> "Any other rule would enable the wrongdoer to profit by his wrongdoing at the expense of his victim. It would be an inducement to make wrongdoing so effective and complete in every case as to preclude any recovery, by rendering the measure of damages uncertain. Failure to apply it would mean that the more grievous the wrong done, the less likelihood there would be of a recovery.
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> "The most elementary conception of justice and public policy require that the wrongdoer shall bear the risk of uncertainty which his own wrong has created. See *Package Closure Corp.* v. *Sealright Co.*, 141 F.2d 972, 979. That principle is an ancient one, *Amory* v. *Delamirie*, 1 Strange 505, and is not restricted to proof of damage in antitrust suit. . . .
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* The Second Circuit's strict standard of causation is illustrated by its holding that the Piper insiders were not liable for their material concealment of their $13 million bonus, because Chris-Craft had called the bonus to the attention of Piper shareholders (A 63).

"The constant tendency of the courts is to find some way in which damages can be awarded where a wrong has been done." 327 U.S. at 264-65.

There is no genuine question of causation in this case. The arithmetic speaks for itself: without all of petitioners' violations, Bangor could not have achieved its 50% majority. Petitioners' only answer is the type of speculative and self-serving arguments condemned by this Court in *Blue Chip*, 421 U.S. at 745-46. If such conjecture does not give an innocent victim a sword with which to sue, it surely cannot provide a shield for the law breaker.

V

THE SECOND CIRCUIT CALCULATED DAMAGES CORRECTLY.

Having played for high stakes in a multi-million dollar contest, having repeatedly violated the law, and having caused massive injury to Chris-Craft's investment, petitioners now complain about the amount of damages they are required to pay. Yet, the Second Circuit emphasized that its award was "the minimum amount of damages that the district court could have awarded without committing reversible error" (B 25). It also double-checked its award against petitioners' expert's computations for a private sale (B 31-32, n.24).

The Damage Calculation Was Conservative

The Second Circuit stressed that damages should compensate Chris-Craft for both elements of the injury caused by petitioners' violations: (1) the lost opportunity to compete for control in a race in which Chris-Craft would have enjoyed a formidable lead but for petitioners' violations; and (2) the wrongful conversion of Chris-Craft's multi-million-dollar plurality into an illiquid 42% minority.

In calculating minimum compensatory damages, the court applied traditional principles and valued Chris-Craft's block *before* and *after* Bangor's illegal seizure of control. For the pre-violation figure, the court used Chris-Craft's actual average cost ($64 per share), although it recognized that a large plurality block would ordinarily have been worth substantially more in an honest race (B 25-26). For the post-violation figure, the court used $27 per share, the highest price that Chris-Craft could have realized on a public sale on assumptions most favorable to petitioners. The court noted that the only realistic way for Chris-Craft to mitigate damages after Bangor's preemption of control was by a registered public offering of its 700,000 shares; that an offering required a registration statement (including audited financials and other time-consuming steps) and could not have taken place until January 1970 at the earliest; and that $27 was the best price that Chris-Craft could have obtained then (B 28-30).*

By using the most conservative figures and assumptions, the Second Circuit calculated damages at $37 per share ($64

* That was a favorable view for petitioners because, in fact, Piper's 1969 audited financials were not ready until May 1970, by which time the market had collapsed. *See supra* at 25, n.

average cost minus $27 resale price). The court then verified this "minimum" award by an alternative calculation, using the testimony of petitioners' principal expert, Gant, based on the price that Chris-Craft could have realized on a private sale the day Bangor took control, on September 5 (B 31-32, n.24).

The cases support the Second Circuit's damage measure. In calculating compensatory damages under the securities laws, the starting point is the cost of plaintiff's shares.* The downside figure is the price that the victim could have realized on a resale.** If there is an unavoidable delay in a resale and market conditions change, that is a risk as-

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* *See, e.g., Harris* v. *American Inv. Co.*, 523 F.2d 220, 225 (8th Cir. 1975), *cert. denied*, 44 U.S.L.W. 3398 (Jan. 13, 1976); *Foster* v. *Financial Technology, Inc.*, 517 F.2d 1068 (9th Cir 1975); *Chasins* v. *Smith Barney & Co.*, 438 F.2d 1167 (2d Cir. 1970); *Esplin* v. *Hirschi*, 402 F.2d 94 (10th Cir. 1968), *cert. denied*, 394 U.S. 928 (1969); 6 Loss, *Securities Regulation* 3922-23 (Supp. 1969). Using cost as the starting point in calculating damages for fraud is also traditional in non-securities cases. *See, e.g.*, Restatement (Second) of Torts §549(1) (Tent. Draft No. 10, 1964).

** *Chasins* v. *Smith, Barney & Co., supra; Esplin* v. *Hirschi, supra*, at 104-05; *Myzel* v. *Fields*, 386 F.2d 718, 742, 745 (8th Cir.), *cert. denied*, 390 U.S. 951 (1967); *cf. Schwartz* v. *NMS Indus., Inc.*, 517 F.2d 925, 931 (5th Cir. 1975), *cert. denied*, 44 U.S.L.W. 3398 (Jan. 13, 1976). Professor Loss states, "Where there is no market, it has been held that 'fair value is to be determined from all of the pertinent circumstances both for a reasonable time before the sale and after it. . . . If there can be no exact calculation . . ., the wrongdoer cannot complain if a reasonable approximation is reached.' *Ross* v. *Licht*, 263 F. Supp. 395, 410 (S.D.N.Y. 1967) . . . ." 6 Loss, *Securities Regulation* 3923 (Supp. 1969). *See also* Restatement (Second) of Torts, *supra*, §549, comment *c* at 153.

sumed by the wrongdoer.* Above all, when wrongdoers make precise damage computations difficult, all uncertainties must be resolved against them under the settled principle articulated in *Bigelow* and other cases.**

Thus, in *Gould* v. *American-Hawaiian Steamship Company*, [1975-76 Transfer Binder] CCH Fed. Sec. L. Rep. ¶95,512 (3d Cir. 1976), large stockholders received a premium above the price received by small stockholders on a merger. The Third Circuit awarded damages based on its estimate of the additional amount plaintiffs might have been able to bargain for if the proxy materials were not misleading:

> "It is always difficult to measure the damages resulting from a lost opportunity, especially one, such as we have here, which has no ascertainable market value.

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* Thus, in *United States* v. *Swift & Co.*, 270 U.S. 124 (1926), where the Army breached its contract to purchase large quantities of special bacon, the Court rejected the claim that Swift should have mitigated by reselling sooner, when the market was higher, because of the difficulties in disposing of the sizable amounts of "this peculiar kind" of bacon. The Court stated: "This was a case where the only standard could be the contract price and the amount realized at actual sale by diligent effort." 270 U.S. at 149. Chris-Craft's large and illiquid Piper block, salable if at all by a registered public offering, is strikingly analogous to Swift's salty Army bacon. *See also Schwartz* v. *NMS Indus., Inc.*, 517 F.2d 925, 931 (5th Cir. 1975), *cert. denied*, 44 U.S.L.W. 3398 (Jan. 18, 1976); *cf. In re Kellett Aircraft Corp.*, 186 F.2d 197, 198-99 (3d Cir. 1950); *and see* Restatement (Second) of Torts, *supra*, §549, comment *c* at 154.

** *Bigelow* v. *RKO Radio Pictures, Inc.*, 327 U.S. 251, 264-65 (1946). *See Story Parchment Co.* v. *Paterson Parchment Paper Co.*, 282 U.S. 555, 563 (1931); *Eastman Kodak Co.* v. *Southern Photo Co.*, 273 U.S. 359, 379 (1927); *Lehrman* v. *Gulf Oil Co.*, 464 F.2d 26, 46 (5th Cir.), *cert. denied*, 409 U.S. 1077 (1972).

> Many imponderables are involved .... Moreover, here there is no known fixed amount, such as a prize, the opportunity to acquire which has been lost. In these cases the risk of uncertainty as to the amount of damages is cast on the wrongdoer and it is the duty of the fact finder to determine the amount of damage as best he can from all the evidence in the case. If this were not so, section 14(a) could be violated with impunity in any situation in which the violation does not cause out of pocket loss." *Id.* at 99,601 (footnote omitted).

Here, Chris-Craft not only lost the "prize" (control of Piper), but suffered substantial "out of pocket loss" (destruction of its $60 million investment).*

Petitioners' Claims Are Fallacious

The "fundamental flaw" in the damage measure, according to Bangor, is that it was not keyed to Chris-Craft's injury. Br. for Bangor at 82. Bangor defines that injury as follows: "CCI lost, at the very most, only an opportunity to compete for control." *Id.* at 88. This mistakenly assumes that Chris-Craft merely bought a raffle ticket and lost a chance to win the prize. In fact, Chris-Craft lost far

* There is a hollow ring to petitioners' protestations of hardship from the damage award. Those claims, legally irrelevant, ignore the massive injury to Chris-Craft, which has been in precarious financial condition for the past six years as a result of petitioners' violations. Moreover, while prosperous First Boston now claims that the judgment represents a significant share of its net worth, Br. for First Boston at 53, its Chairman publicly announced that in the unlikely event that First Boston paid the entire judgment, the net after-tax effect would be only $16 million, and that its financial integrity would not be impaired. *Wall St. Journal*, April 16, 1975, at 8, col. 3. This, of course, takes no account of contribution.

more: its 700,000 share position was transformed from an attractive plurality into an illiquid permanent minority.*

Bangor contends that the Second Circuit's damage formula, including what Bangor calls indemnification "for market losses," would have been proper if Bangor had induced Chris-Craft to enter the contest. Br. for Bangor at 90-91. But in fact Chris-Craft was induced: it invested millions of dollars in the justifiable belief that its rivals would comply with the law (A 60; B 26). Chris-Craft would not have invested a cent, no less $60 million, if it knew that its rivals could win by illegal tactics.** In these circumstances, the court's damage theory is too lenient. Chris-Craft had asked the court to compel Bangor to buy its block at cost.† The Second Circuit did not adopt that approach, which would have eliminated all uncertainties, because it was willing to assume (favorably to petitioners) that Chris-Craft might have been able to sell its 700,000 shares via a registered public offering (B 31, n.23).

* In accordance with petitioners' "zero damages" theory, the district court ignored this critical fact by equating Chris-Craft's 700,000 shares with a readily salable "anonymous 100-share block" (B 52). The court of appeals pointed out the obvious fallacy of concluding that 700,000 shares of Piper had the same value per share as one hundred readily-marketable shares (B 19).

** While Chris-Craft, in paying an average of $64 per share for its Piper stock, assumed the ordinary risk that it might lose a fair contest, it did not assume the extraordinary risk that it would be a sure loser in a rigged contest (A 60).

† This is an appropriate remedy. *See, e.g., Gordon* v. *Burr*, 506 F.2d 1080 (2d Cir. 1974); *Gerity* v. *Cable Funding Co.*, 372 F. Supp. 679, 683 nn.4 & 5 (D. Del. 1973); 3 Bromberg, *Securities Law, Fraud: SEC Rule 10b-5*, §9.1, at 226 & n.2 (1975). *Cf. Gottlieb* v. *Sandia American Corp.*, 304 F. Supp. 980, 989-91 (E.D. Pa. 1969), *aff'd in part, rev'd in part on other grounds*, 452 F.2d 510 (3d Cir.), *cert. denied*, 404 U.S. 938 (1971).

Bangor objects to the use of Chris-Craft's $64 cost, claiming that Chris-Craft made "a bad investment."* Br. for Bangor at 85-86. But Bangor paid $80 per share, and its president insisted that it acted prudently (*see* B 22, n.15). In any event, actual cost is the traditional basis for computing damages, as shown by the precedents by Judges Cardozo and Learned Hand, cited by the Second Circuit (B 22 & n.15).** Here, the Second Circuit's use of cost, rather than a higher value including a control premium, was intentionally favorable to petitioners (B 25-26).

Bangor criticizes the Second Circuit for using as the post-violation value of Chris-Craft's block the best price obtainable in a January public offering. Bangor states "The long delay [between September and January] was based on an assumption—never briefed or argued—that CCI would have had to register its Piper shares and that it would take that long to do it." Br. for Bangor at 86. That is false: the point was the subject of testimony given on the very first day of the damage trial (App. 2435-39), testimony that was never disputed by petitioners' witnesses. In fact, the experts for both sides agreed that, in addition to legal requirements, registration was a practical necessity for a public sale of 700,000 shares (App. 2436-39, 2828-30).

Petitioners argue that the $27 figure in effect compensates Chris-Craft for the stock market decline between

* Bangor's alternate claim, Br. for Bangor at 85, that $64 was not Chris-Craft's cost is contrary to the stipulated facts (App. 487-89). Bangor never challenged the cost figures before.

** *Borg* v. *International Silver Co.*, 11 F.2d 147, 152 (2d Cir. 1925) (L. Hand, J.); *Triangle Waist Co.* v. *Todd*, 223 N.Y. 27, 31 (1918) (Cardozo, J.). *See also Levin* v. *Mississippi River Corp.*, 59 F.R.D. 353, 370 (S.D.N.Y. 1973) (Weinfeld, J.), *aff'd sub nom. Wesson* v. *Mississippi River Corp.*, 486 F.2d 1398 (2d Cir. 1974).

September and January. But Chris-Craft was trapped during that period as a result of petitioners' violations. No outsider would touch Chris-Craft's huge minority block (B 28-29). And Bangor, the only realistic buyer of this large minority position, refused to extend its exchange offer for Chris-Craft: Bangor believed that with Chris-Craft unable to dispose of its shares, time would work to Bangor's advantage and that it would "treat" with Chris-Craft after it had come under pressure from its bankers (App. 1885-86). Having caught Chris-Craft in a snare, the wrongdoers must assume the risk of any market shifts, up or down, until the earliest opportunity for a sale.

Moreover, petitioners' repeated claims about the five-month market decline are undermined by their principal expert, Gant, who calculated the price Chris-Craft could have realized on September 5, the day Bangor gained control, by a private sale, assuming that a buyer could be found (B 31-32, n.24). A private sale was the only theoretically possible method of resale in September, and Gant's computations produced approximately the same damages in September as an assumed January public offering. *Id.*

Indeed, petitioners attack on the five-month "delay" is a red-herring. In reality, there would have been a nine-month delay because Piper's financials were not ready until May.

Petitioners also contend that the Solicitor General disagreed with the Second Circuit on the damage issue. The Solicitor, in fact, calculated idential damages by an alternative formula. Brief for the United States as *Amicus Curiae* Opposing Certiorari at 23-24. His theory parallels

the Second Circuit's own alternative calculation based on the testimony of petitioners' expert (B 31-32, n.24).

Petitioners further argue that Chris-Craft would have suffered a decrease in the value of its holdings even if it had won majority control because of stock market fluctuations. Br. for Bangor at 87; Br. for First Boston at 48; Br. for Piper at 49. But if Chris-Craft had won, it would have had no reason to sell (App. 2834); and if it ultimately chose to do so, it could have waited for optimum market conditions. Indeed, as a majority holder, Chris-Craft could have used a market decline to its advantage: market dips provide a unique opportunity to acquire large minority blocks by purchase or merger (App. 2521-22).

But Chris-Craft does not enjoy majority status. Because of petitioners' violations, it is a minority shareholder of Piper, really no more than a tenant at will who can be sure of only one thing—that a merger will be compelled by Bangor at a time when Chris-Craft's block can be taken for a song.* For this reason, the minority interest in Piper is of virtually no value to Chris-Craft and was not even regarded as good collateral by its bankers (App. 3120-21). It is, as the Second Circuit recognized, an encumbrance—a minority position unique because of its huge size and illiquidity (A 60).**

* Bangor's ill-gotten power to compel a merger still remains. Its exercise has merely been deferred by the lower court until 1979. Final Judgment and Decree, dated November 22, 1974.

** Courts have traditionally given discounts of as much as 50% for large minority blocks. *Kaufman* v. *Diversified Indus., Inc.*, 460 F.2d 1331, 1335-36 (2d Cir.), *cert. denied*, 316 U.S. 689 (1972); *Helvering* v. *Maytag*, 125 F.2d 55 (8th Cir.), *cert. denied*, 316 U.S. 689 (1942).

Bangor's president acknowledged that minority and majority positions were different species when he admitted that Bangor's purchase of control of Piper at $80 a share was a prudent investment (B 26; App. 2968-69); and that he would not trade places with Chris-Craft or sell Bangor's illegally acquired swing blocks to it (App. 1885, 2995). That testimony punctures the rhetoric of petitioners' briefs.

The sale of Chris-Craft's interest is not just a matter of mitigation of damages, but an economic necessity caused by petitioners' violations. Because of Bangor's seizure of control, Chris-Craft is in the position of a "forced seller," while Bangor is in the position of the only buyer.

The Court of Appeals Had the Power to Calculate Damages

There is no merit to the claim that the Second Circuit switched damage theories and should, in any case, have remanded the case to the district judge for a new damage trial. Br. for Bangor at 91-96. Chris-Craft tried its damage case on the very theory the Second Circuit applied in *CC III*, which was proclaimed in the proposed pretrial orders, the experts' reports (*e.g.*, EV 820-21) and the pretrial brief. Petitioners' principal witness also testified on that theory. Petitioners merely want another damage trial. Seven years of litigation have been enough.*

* Byrd v. *Blue Ridge Rural Elec. Cooperative, Inc.*, 356 U.S. 525 (1958), cited by Bangor, is inapposite. There, the lower court had struck an affirmative defense and plaintiff thus had no opportunity to present evidence with respect to that defense. This Court held that the appellate court should not have reinstated the defense and granted judgment for the respondent, without a remand to give the plaintiff a chance to present its evidence on that defense. The other cases cited by Bangor similarly involve a dismissal or other summary disposition of an issue. *See* Br. for Bangor at 93. Here, in contrast, the trial judge, at the beginning of the trial, expressly invited the parties to present their evidence on *all* damage theories (App. 2404), and both sides did so.

The Second Circuit's decision to calculate the "minimum" permissible damages rather than to remand the case again was clearly a proper exercise of its discretion under 28 U.S.C. §2106. Here, there was an undisputed factual record as to the key factors necessary to make a "minimum" damage calculation.* Here, petitioners have the burden of proof on mitigation. Here, the litigation had already been in the district court three times and had dragged on for six years to the grave prejudice of Chris-Craft, most of whose assets remain frozen in its illiquid minority position. Here, the trial judge had twice rejected the appellate court's directions.** And here the Second Circuit made a conservative award and resolved all doubts in petitioners' favor precisely because it was making the calculation itself (B 25-26, 32, n.24). In such circumstances, appellate courts clearly have the discretion to fix damages themselves.†

* The Second Circuit stressed that it could compute damages on the basis of undisputed facts in the record (B 23-24). Petitioners now feebly suggest credibility questions and issues of fact. But as to the critical facts, Chris-Craft's cost and resale price, there was no dispute. There were, in fact, no significant factual controversies at the damage trial. The differences related to legal theories of damages. Chris-Craft presented its theory of damages (cost less resale value). Petitioners' witnesses testified both on Chris-Craft's theory and on petitioners' own theory of "zero damages" (statutory appraisal value of 100 shares before and after Bangor took control).

** The trial court did not conceal its disagreement with the Second Circuit's view on the merits, saying, among other things, "the district court must follow the mandate of the Court of Appeals however erroneous the lower Court may deem that mandate to be" (B 50, n.6; *see also* B 46, 49-50).

† *See, e.g., Petition of United States Steel Corp.*, 479 F.2d 489, 500-01 (6th Cir.), *cert. denied*, 414 U.S. 859 (1973); *Georgia-Pacific Corp.* v. *U.S. Plywood Champion Papers, Inc.*, 446 F.2d 295, 299-300 (2d Cir.), *cert. denied*, 404 U.S. 870 (1971); *Oil Screw Noah's Ark* v. *Bentley & Felton Corp.*, 322 F.2d 3, 9 (5th Cir. 1963); *Texas Co.* v. *R. O'Brien & Co.*, 242 F.2d 526, 529 (1st Cir. 1957); *Smith* v. *Dravo Corp.*, 208 F.2d 388, 391 (7th Cir. 1953); 9 Wright & Miller, *Federal Practice & Procedure* §2577, at 699-701 (1971).

Finally, petitioners' objection to the interest award is untenable. In *Blau* v. *Lehman*, 368 U.S. 403, 414 (1962), the Court stated that interest is "given in response to considerations of fairness." The district court awarded interest, and the Second Circuit, which had the power to fix damages, clearly had the power to direct that interest be computed on the adjusted award.* In this case, Chris-Craft's actual carrying charges on its frozen investment far exceeded the allowed interest.

VI

FIRST BOSTON'S CLAIM OF IMMUNITY UNDER THE 1933 ACT IS SHAM.

The main theme of First Boston's brief is that it is entitled to immunity or a limitation on damages because of the special provisions for underwriters contained in Section 11 of the 1933 Act. That argument rests on a false premise. First Boston was *not* held liable under Section 11 for failing to discharge a duty of "due diligence." It was held liable under Section 14(e) because it knew from Bangor's minutes that BAR's value was inflated but elected to remain silent. Section 14(e) applies to "any person" making a misstatement in support of, or in opposition to a tender offer—a deliberately broad category, as shown by the legislative history.** Moreover, First Boston was not

* Indeed, in *CC III*, the district court specifically looked to the Second Circuit for instructions in setting the amount of interest to be awarded and recognized the authority of the court of appeals to fix such amount (B 79, n.24). Case law is in accord with this view. *Occidental Life Ins. Co.* v. *Pat Ryan & Assoc., Inc.*, 496 F.2d 1255, 1268-69 (4th Cir.), *cert. denied*, 419 U.S. 1023 (1974).

** The original draft of the Williams bill particularized the persons to be covered by Section 14(e)'s prohibitions. In early drafts,

(footnote continued on next page)

merely the dealer-manager for Bangor's offer; it was also the appraiser to assure the public that Bangor's exchange package was worth $80.

First Boston glosses over the significant differences between Section 11 of the 1933 Act and Section 14(e) of the 1934 Act. Section 11 imposes virtually absolute liability on underwriters for material misstatements in registration statements, unless the underwriter can satisfy the burden of proving that it acted without negligence. As a trade-off for imposing such strict liability, Section 11 contains special provisions for underwriters and others, such as a limitation on damages. This trade-off is reflected in the congressional history.* In contrast, defendants charged with violating Section 14(e) are not subject to the strict liability standards of Section 11, and the plaintiff has the burden of proving scienter. Thus, defendants who violate Section 14(e) are not entitled to Section 11's artificial limitations on liability. Here, the Second Circuit clearly distinguished between Sections 11 and 14(e) and held First Boston liable under Section 14(e) (A 51-55, 116-17; B 10).

Indeed, First Boston's arguments for Section 11 immunity in a Section 14(e) case were flatly rejected, not just

those circularizing or soliciting for or in opposition to an offer, as well as management, were covered. 112 Cong. Rec. 19,007 (Aug. 11, 1966) (SEC Memorandum); 113 Cong. Rec. 857 (Jan. 18, 1967). Ultimately, Congress chose the most inclusive language possible—that "any person" would be subject to 14(e)'s prohibitions. 113 Cong. Rec. 24,663 (Aug. 30, 1967).

* As to Section 11, *see* H. R. Rep. No. 85, 73d Cong., 1st Sess. 9-10 (1933); H. R. Rep. No. 152, 73d Cong., 1st Sess. 26 (1933) (Conference Report). As to Section 11(e) liability limitations added in 1934, *see* 78 Cong. Rec. 8669 (May 12, 1934); 78 Cong. Rec. 10,185 (June 1, 1934).

by the Second Circuit, but by Congress in passing the Williams Act. The investment banking community had urged that registered exchange offers be exempt from Section 14(e) and other provisions of the Williams Act because they were already covered by the 1933 Act. *Senate Hearings* at 112, 164. Chairman Cohen and others opposed this position. *See supra* at 70-71, n.**. As a result, Congress deleted the provision exempting registered exchange offers in the Senate version of Section 14(e). And the House and Senate Reports on Section 14(e) state that it applies to tender offers "whether for cash, securities or other consideration." S. Rep. No. 550, 90th Cong., 1st Sess. 11 (1967); H. R. Rep. No. 1711, 90th Cong., 2d Sess. 11 (1968).*

Long before the enactment of Section 14(e), it was settled that an underwriter guilty of violating one of the disclosure or antifraud provisions of the securities laws could not seek sanctuary in Section 11. That has been the law for a quarter of a century since the landmark opinion in *Fischman* v. *Raytheon Manufacturing Co.*, 188 F.2d 783 (2d Cir. 1951).** Indeed, during the

* The fact that Congress insisted that Section 14(e) should apply to exchange offers registered under the 1933 Act makes apt this Court's statement (about two other sections of the 1934 Act) in *SEC* v. *National Securities, Inc.*, 393 U.S. 453, 468 (1969): "The two sections of the Act apply to different sets of situations . . . . The fact that there may well be some overlap is neither unusual nor unfortunate."

** In that opinion by Judge Frank, a former SEC Chairman, the Second Circuit held that where a fraudulent prospectus for preferred stock had the effect of misleading common stockholders, they had standing under the antifraud provisions of Section 10(b), and the defendant was not entitled to invoke the standing limitations of Section 11. Judge Frank declared: "Were this not true, Section 11

(footnote continued on next page)

trial of this case, First Boston itself espoused the *Fischman* rationale.*

Acceptance of First Boston's theory that an underwriter who sponsors a false prospectus in a control contest is immune under Section 11 would lead to anomalous results. A tenderor, management or investment banker issuing a false press release would be liable for full compensatory damages under Section 14(e); but an underwriter who promotes a false prospectus—a more important document —would be immune under Section 11. In effect, First Boston seeks to make bankers a privileged class. But the Second Circuit in its *Chris-Craft* opinions emphasized that the very stature of this underwriter gave it greater clout to cause harm because of public reliance on its prestigious name (A 50-51). That was particularly true here in view of First Boston's multiple roles as public appraiser for the

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of the 1933 Act, designed to protect investors even when there is no fraud, would afford a shelter or sanctuary for those who defraud investors." 188 F.2d at 787. The *Fischman* rule has been adopted in numerous cases involving Section 10(b) and other provisions of the securities laws. *See, e.g., Newman* v. *Prior*, 518 F.2d 97, 99 (4th Cir. 1975); *Parrent* v. *Midwest Rug Mills, Inc.*, 455 F.2d 123, 125 & n.3 (7th Cir. 1972); *Donlon Indus., Inc.* v. *Forte*, 402 F.2d 935, 936 n.2 (2d Cir. 1968) (Friendly, J.); *McClure* v. *Borne Chemical Co.*, 292 F.2d 824, 836-37 (3d Cir.), *cert. denied*, 368 U.S. 939 (1961). Regarding damages, *see Grossman, Faber & Miller, P.A.* v. *Cable Funding Corp.*, [1974-75 Transfer Binder] CCH Fed. Sec. L. Rep. ¶94,913, at 97,120-21 (D. Del. 1974); *Unicorn Field, Inc.* v. *Cannon Group, Inc.*, 60 F.D.R. 217, 226-27 (S.D.N.Y. 1973).

* "Chris-Craft . . . admits it is not entitled to sue under the 1933 Act. To have standing thereunder, a plaintiff must have purchased securities offered by the prospectus. The distinction between what must be proven under the 1934 Act as against the 1933 Act has long been recognized. In *Fishman* [sic] v. *Raytheon, supra*, Judge Frank laid down the rule that a plaintiff without standing under the 1933 Act must prove the additional element of fraud to recover under Rule 10b-5." First Boston Trial Memorandum at 19-20 (March 4, 1971).

Piper stockholders, and dealer-manager for Bangor. It had a major financial stake in the outcome of the contest.* First Boston was thus much more than an underwriter—a fact further discrediting its Section 11 defense.

Investment bankers and underwriters, like lawyers, accountants and ordinary citizens, have been held liable in many cases under the securities laws.** As Judge Friendly has stated:

> "In our complex society the accountant's certificate and the lawyer's opinion can be instruments for inflicting pecuniary loss more potent than the chisel or the crowbar." *United States* v. *Benjamin*, 328 F.2d 854, 863 (2d Cir.), *cert. denied*, 377 U.S. 953 (1964).

Investment bankers can wield the same "chisel or crowbar."†

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* First Boston, contrary to its present assertion, Br. for First Boston at 53, had a substantial financial interest in the contest wholly apart from its fee as underwriter for Bangor's false prospectus. First Boston was also the paid investment adviser to the Pipers for almost a year. Bangor agreed to pay First Boston "an amount not yet determined" (EV 35) if it obtained control of Piper. Although never publicly revealed, the amount is of sufficient magnitude to warrant a separate notation in Bangor's and Piper's financials. *See, e.g.*, Bangor's Annual Report for 1973, EV 1026.

** Two investment bankers were held liable in far less extreme circumstances (and where they wore fewer hats) for failure to exercise independent judgment as to the value of inflated assets in *Kohn* v. *American Metal Climax, Inc.*, 458 F.2d 255, 268 (3d Cir.), *cert. denied*, 409 U.S. 874 (1972). *See also Shapiro* v. *Merrill Lynch, Pierce, Fenner & Smith, Inc.*, 495 F.2d 228 (2d Cir. 1974); *Globus* v. *Law Research Serv., Inc.*, 418 F.2d 1276, 1288-89 (2d Cir.), *cert. denied*, 397 U.S. 913 (1970); *Jordon Bldg. Corp.* v. *Doyle, O'Connor & Co.*, 401 F.2d 47 (7th Cir. 1968); *Dorfman* v. *First Boston Corp.*, 336 F. Supp. 1089 (E.D. Pa. 1972).

† First Boston's reliance on *Ultramares Corp.* v. *Touche*, 255 N.Y. 170 (1931), is misplaced. There, Judge Cardozo held that an auditor who endorsed an opinion of value he knew was false, or who acted with reckless disregard for the truth, would be liable to third parties for misrepresentation. *Id.* at 186, 190-91.

VII

PETITIONERS WERE PROPERLY HELD TO BE JOINTLY AND SEVERALLY LIABLE.

The Second Circuit held petitioners jointly and severally liable because "the conduct of each of the petitioners, through their violation of the securities laws, contributed to the success of BPC's takeover attempt" (A 69; B 4). Bangor, which was at the core of the violations, does not complain about this. But First Boston and the Piper insiders do. Br. for First Boston at 51-52; Br. for Piper at 39-46. They argue that they should not be jointly and severally liable and that, instead, damages should be apportioned according to each petitioner's relative culpability.

But it is hornbook law that individual tortfeasors whose combined misdeeds contribute to an indivisible injury (here, converting Chris-Craft's huge block from a commanding plurality into an unsalable minority) are jointly and severally liable, especially when they cooperated for nine months in a campaign against their victim. Thus, Dean Prosser states:

> "Where two or more causes combine to produce such a single result, incapable of any logical division, each may be a substantial factor in bringing about the loss, and if so, each must be charged with all of it . . . . The duties which are owed to the plaintiff by the defendants are separate, and may not be identical in character or scope, but entire liability rests upon the obvious fact that each has contributed to the single result, and that no rational division can be made."
> Prosser, *Law of Torts* 315-16 (4th ed. 1971) (footnote omitted).*

Prosser gives this example: if two defendants separately shoot a victim and he dies from the effect of both wounds, liability cannot logically be divided, and each defendant will be held liable for the whole loss. *Id.* at 314. Here, all petitioners shot at Chris-Craft and hit the bull's-eye.

The traditional rule discussed by Dean Prosser applies with equal force in the securities field, according to Professor Loss.**

The application of those principles is clearly correct here. The Piper insiders initiated the "scorched earth" campaign, issued fraudulent statements and recruited First Boston and Bangor. First Boston—involved at every critical juncture—delivered the final blow by concealing the BAR loss. Petitioners, all with a substantial stake in the

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* *Aro Mfg. Co.* v. *Convertible Top Replacement Co.*, 377 U.S. 476, 500-01 (1964); *Miller* v. *Union Pacific R.R.*, 290 U.S. 227, 236 (1933). *See also* 1 Harper & James, *The Law of Torts* §10.1, at 692-93, 697-98 (1956).

** "When a number of defendants have participated in a scheme that would have collapsed if any of the defendants had made the disclosure required by Rule 10b-5, there is no way to apportion guilt. Under these conditions, it is appropriate to apply the principle that each joint tortfeasor is liable for the full amount of damages. *Ross* v. *Licht*, 263 F. Supp. 395, 411 (S.D.N.Y. 1967), citing *Restatement of Torts* §§875-76." 6 Loss, *Securities Regulation* 3924 (Supp. 1969). *See also Gould* v. *American-Hawaiian S.S. Co.*, [1975-76 Transfer Binder] CCH Fed. Sec. L. Rep. ¶95,512, at 99,598 (3d Cir. 1976); *Myzel* v. *Fields*, 386 F.2d 718, 750 (8th Cir. 1967), *cert. denied*, 390 U.S. 951 (1968). Here, if First Boston had spoken out about BAR, it would have exposed the misrepresentation.

success of the campaign against Chris-Craft, are jointly and severally liable under conventional legal principles.*

Finally, the claim by the Piper insiders (Br. for Piper at 39) and First Boston (Br. for First Boston at 52) that damages should be apportioned is not properly raised before this Court. While the Pipers' pretrial brief in *CC III* stated that if damages were awarded "with all defendants jointly and severally liable," the trial court "at an appropriate stage thereafter . . . should determine the rights and liabilities of the defendants to each other,"** no petitioner ever pressed that request nor made cross-complaints against the other petitioners. The apportionment issue, not even litigated yet, is obviously not an appropriate matter for consideration by this Court. Petitioners, if they wish, are free to pursue a contribution proceeding,† where

* There is similarly no merit to the Pipers' alternative claim that they can escape liability because the other petitioners' acts were supervening causes which occurred several months after the Pipers' original violations. Br. for Piper at 26-35. The doctrine of intervening cause in the cases cited by the Pipers does not apply to these intentional misdeeds, because the Pipers brought the other wrongdoers into the plan against Chris-Craft and because the Pipers' fraudulent public statements had a continuing adverse impact on Chris-Craft throughout the contest (A 62). *See, e.g., Freeman* v. *United States,* 509 F.2d 626, 633-34 (6th Cir. 1975); *Lopez* v. *Southern Pacific Co.,* 499 F.2d 767, 772 (10th Cir. 1974); *Michael* v. *United States,* 338 F.2d 219, 220-21 (6th Cir. 1964).

** Feb. 28, 1974, at 2 n.

† "[T]he plaintiff's right to recover for his harm should not depend on his ability to apportion the damage [;] this is a problem which is properly left with the defendants themselves." 1 Harper & James, *The Law of Torts* §10.1, at 702; 3 Loss, *Securities Regulation* 1739-40, n.178 (2d ed. 1961). *See also* Douglas & Bates, *The Federal Securities Act of 1933,* 43 Yale L.J. 171, 178-79 (1933); *Gould* v. *American-Hawaiian S.S. Co.,* 387 F. Supp. 163 (D. Del. 1974), *mod.,* [1975-76 Transfer Binder] CCH Fed. Sec. L. Rep. ¶95,512 (3d Cir. 1976); *Globus, Inc.* v. *Law Research Ser., Inc.,* 318 F. Supp. 955 (S.D.N.Y. 1970), *aff'd per curiam,* 442 F.2d 1346 (2d Cir.), *cert. denied,* 404 U.S. 941 (1971).

each can seek to lay blame at the other's doorstep. But their victim's right to recover compensatory damages, already delayed for many years, should not be further postponed.

Conclusion

For the foregoing reasons, the judgment of the Court of Appeals should be affirmed.

Respectfully submitted,

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Dated: New York, New York
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CERTIFICATE OF SERVICE

I hereby certify that three copies of the foregoing Brief for Respondent were served by mail this 2nd day of August, 1976, on each of the following:

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